

EXPOSURE DRAFT

2010-2011-2012

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

EXPOSURE DRAFT (20/12/2011)

Corporations Amendment (Similar Names) Bill 2012

No. , 2012

(Treasury)

**A Bill for an Act to amend the *Corporations Act
2001*, and for related purposes**

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1 **A Bill for an Act to amend the *Corporations Act***
2 ***2001*, and for related purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *Corporations Amendment (Similar*
6 *Names) Act 2012*.

7 **2 Commencement**

8 (1) Each provision of this Act specified in column 1 of the table
9 commences, or is taken to have commenced, in accordance with
10 column 2 of the table. Any other statement in column 2 has effect
11 according to its terms.
12

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Commencement information

Column 1	Column 2	Column 3
Provision(s)	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	A single day to be fixed by Proclamation. However, if the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	

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

4 (2) Any information in column 3 of the table is not part of this Act.
5 Information may be inserted in this column, or information in it
6 may be edited, in any published version of this Act.

7 **3 Schedule(s)**

8 Each Act that is specified in a Schedule to this Act is amended or
9 repealed as set out in the applicable items in the Schedule
10 concerned, and any other item in a Schedule to this Act has effect
11 according to its terms.
12

Schedule 1—Amendments

Corporations Act 2001

1 After Part 5.8A

Insert:

Part 5.8B—Personal liability of directors for the debts of certain companies

596AJ Personal liability of directors for the debts of certain companies

- (1) A person is liable to discharge the liability of a company (the *debtor company*) for a debt incurred by the debtor company if:
- (a) when the debt was incurred, the person was a director of the debtor company; and
 - (b) the person was a director of a failed company at any time during the 12-month period ending at the start of the relevant date in relation to the winding up of the failed company; and
 - (c) when the debt was incurred, the debtor company was known by a name that:
 - (i) is the same as a pre-liquidation name of the failed company; or
 - (ii) is so similar to a pre-liquidation name of the failed company as to suggest an association with the failed company; and
 - (d) the debt was incurred during the 5-year period beginning at the start of the relevant date in relation to the winding up of the failed company; and
 - (e) the debt was incurred after the commencement of this section; and
 - (f) the person is not exempt from this section in relation to the debt.

Note 1: For *failed company*, see section 596AO.

Note 2: For *pre-liquidation name*, see section 596AP.

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Schedule 1 Amendments

1 Note 3: For the name by which a company is *known*, see section 596AQ.

- 2 (2) The person is liable both:
3 (a) individually; and
4 (b) jointly with the debtor company and anyone else who is
5 liable under this section in relation to the same debt.

6 **596AK Exemption for a person covered by court order**

- 7 (1) The Court may, on the application of a person, make an order
8 exempting the person from section 596AJ in relation to a specified
9 debt, or a specified class of debts, that has been, or may be,
10 incurred by the debtor company mentioned in that section.
- 11 (2) The exemption may be:
12 (a) unconditional; or
13 (b) subject to such conditions (if any) as are specified in the
14 order.
- 15 (3) The Court must not make an order under subsection (1) unless the
16 Court is satisfied that:
17 (a) the person has acted honestly; and
18 (b) having regard to all the circumstances of the case, the person
19 ought fairly to be exempt from section 596AJ in relation to
20 the debt or debts covered by the order.
- 21 (4) In exercising its powers under subsection (1), the Court must have
22 regard to the following matters:
23 (a) whether:
24 (i) at a time when the person was a director of the failed
25 company mentioned in section 596AJ, the failed
26 company incurred a debt; and
27 (ii) immediately before the time when the debt was
28 incurred, there were no reasonable grounds to expect
29 that the failed company would be able to pay the debt;
30 (b) the extent to which, and the circumstances in which, any
31 assets of the failed company have become assets of the
32 debtor company;
33 (c) the extent to which, and the circumstances in which, any
34 individuals who were employed by the failed company have
35 become employees of the debtor company;

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Amendments **Schedule 1**

- 1 (d) the extent to which, and the circumstances in which, any
2 premises that were used by the failed company have become
3 premises used by the debtor company;
4 (e) the extent to which, and the circumstances in which, any
5 contact details that were used by the failed company have
6 become contact details used by the debtor company;
7 (f) whether anything done, or omitted to be done, by the person
8 or the debtor company is likely to create the misleading
9 impression that the failed company and the debtor company
10 are the same entity;
11 (g) whether the person has previously been liable under
12 section 596AJ;
13 (h) any other relevant matters.
- 14 (5) As soon as practicable after a person makes an application under
15 subsection (1), the person must lodge with ASIC notice of the
16 making of the application. The notice must be in the prescribed
17 form.

18 **596AL Exemption granted by the liquidator of a failed company**

- 19 (1) The liquidator of the failed company mentioned in section 596AJ
20 may, on the application of a person, make a determination
21 exempting the person from that section in relation to a specified
22 debt, or a specified class of debts, that has been, or may be,
23 incurred by the debtor company mentioned in that section.
- 24 (2) The exemption may be:
25 (a) unconditional; or
26 (b) subject to such conditions (if any) as are specified in the
27 determination.
- 28 (3) The liquidator must not make a determination under subsection (1)
29 unless the liquidator is satisfied that:
30 (a) the person has acted honestly; and
31 (b) having regard to all the circumstances of the case, the person
32 ought fairly to be exempt from section 596AJ in relation to
33 the debt or debts covered by the determination.
- 34 (4) In exercising his or her powers under subsection (1), the liquidator
35 must have regard to the following matters:
36 (a) whether:

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Schedule 1 Amendments

- 1 (i) at a time when the person was a director of the failed
2 company, the failed company incurred a debt; and
3 (ii) immediately before the time when the debt was
4 incurred, there were no reasonable grounds to expect
5 that the failed company would be able to pay the debt;
- 6 (b) the extent to which, and the circumstances in which, any
7 assets of the failed company have become assets of the
8 debtor company;
- 9 (c) the extent to which, and the circumstances in which, any
10 individuals who were employed by the failed company have
11 become employees of the debtor company;
- 12 (d) the extent to which, and the circumstances in which, any
13 premises that were used by the failed company have become
14 premises used by the debtor company;
- 15 (e) the extent to which, and the circumstances in which, any
16 contact details that were used by the failed company have
17 become contact details used by the debtor company;
- 18 (f) whether anything done, or omitted to be done, by the person
19 or the debtor company is likely to create the misleading
20 impression that the failed company and the debtor company
21 are the same entity;
- 22 (g) whether the person has previously been liable under
23 section 596AJ;
- 24 (h) any other relevant matters.
- 25 (5) If the person has made an application under subsection 596AK(1)
26 for an order exempting the person from section 596AJ in relation
27 to a debt, or a particular class of debts, that has been, or may be,
28 incurred by the debtor company, the person's application under
29 subsection (1) of this section must be accompanied by:
- 30 (a) a copy of the application under subsection 596AK(1); and
31 (b) if the Court made an order in response to the application
32 under subsection 596AK(1)—a copy of the order; and
33 (c) if the Court decided not to make an order in response to the
34 application under subsection 596AK(1)—a copy of the
35 Court's decision.
- 36 (6) The liquidator must not exercise the power conferred by
37 subsection (1) of this section in a manner contrary to a decision of
38 the Court in proceedings under section 596AK.
-

- 1 (7) The liquidator is entitled to be paid reasonable remuneration by the
2 person for making a determination under subsection (1).
- 3 (8) As soon as practicable after the liquidator makes a determination
4 under subsection (1), the liquidator must:
5 (a) give a copy of the determination to the person; and
6 (b) lodge with ASIC notice of the making of the determination.
7 The notice lodged with ASIC must be in the prescribed form.

8 **596AM Exemption for directors of non-dormant companies**

- 9 (1) A person is exempt from section 596AJ in relation to any debts
10 incurred by the debtor company mentioned in that section if:
11 (a) throughout the 12-month period ending at the start of the
12 relevant date in relation to the winding up of the failed
13 company, the debtor company was known by a name that is:
14 (i) the same as a pre-liquidation name of the failed
15 company mentioned in that section; or
16 (ii) so similar to a pre-liquidation name of the failed
17 company as to suggest an association with the failed
18 company mentioned in that section; and
19 (b) the debtor company was not dormant at any time during that
20 period.
- 21 (2) For the purposes of this section, a company is *dormant* if, and only
22 if, the company is not carrying on business.

23 **596AN Exemption if failed company has paid all of its debts in full**

24 A person is exempt from section 596AJ in relation to any debts
25 incurred by the debtor company mentioned in that section if the
26 failed company mentioned in that section has paid all of its debts in
27 full.

28 **596AO Failed company**

- 29 For the purposes of this Part, if:
30 (a) a company has been wound up; and
31 (b) an unsecured debt or claim was proved in the winding up;
32 and

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Schedule 1 Amendments

1 (c) the relevant date is after the day on which this section
2 commenced;
3 the company is, and is taken always to have been, a *failed*
4 *company*.

5 **596AP Pre-liquidation name**

6 For the purposes of this Part, a *pre-liquidation name* of a failed
7 company is a name by which the company was known at any time
8 during the 12-month period ending at the start of the relevant date
9 in relation to the winding up of the company.

10 **596AQ Names by which a company is known**

11 For the purposes of this Part, a company is *known* by each of the
12 following names:

- 13 (a) the name of the company;
14 (b) if the company carries on its business, or a part of its
15 business, under a particular name—that name.

16 **596AR Contact details**

17 For the purposes of this Part, *contact details* includes the
18 following:

- 19 (a) a telephone number;
20 (b) a fax number;
21 (c) an email address;
22 (d) an internet domain name;
23 (e) an internet URL.