Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018

No. , 2018

(Treasury)

A Bill for an Act to amend the law relating to protecting employee entitlements, and for related purposes
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A Bill for an Act to amend the law relating to protecting employee entitlements, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act is the Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2018.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with

No. 2018 Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018
column 2 of the table. Any other statement in column 2 has effect according to its terms.

<table>
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<tr>
<th>Provisions</th>
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<tr>
<td>1. The whole of this Act</td>
<td>The day after this Act receives the Royal Assent.</td>
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(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.
Schedule 1—Amendments

Part 1—Employee entitlements

Corporations Act 2001

1 Section 9 (definition of linked)
Omit “section 596AB are linked if they are linked under subsection 596AB(4)”, substitute “subsection 596AC(1) are linked if they are linked under subsection 596AC(4)”.

2 Paragraph 588N(b)
Omit “section 596AC in relation to a contravention of section 596AB”, substitute “section 596ACA in relation to a contravention of subsection 596AC(1)”.

3 Section 596AA (heading)
Repeal the heading, substitute:

596AA Objects and coverage of this Part

4 Subsection 596AA(1)
Repeal the subsection, substitute:

Objects

(1) The objects of this Part are to:
(a) deter avoidance of the payment of the entitlements of employees; and
(b) protect the entitlements of a company’s employees from agreements, arrangements and transactions that prevent the recovery of those entitlements or significantly reduce the amount of the entitlements that can be recovered.

Note: For example, this Part may apply:
(a) where the owner or owners of a company remove assets from the company before it is wound up, resulting in the company being unable to pay the entitlements of its employees; or
Schedule 1  Amendments

Part 1  Employee entitlements

(b) where a group of entities is structured in a way that results in the entitlements of employees being owed by a company that is wound up while other members of the group continue to exist.

5  Subsection 596AA(2)

Omit “An entitlement of an employee need not be owed to the employee. It might, for example, be an amount owed to the employee’s dependants or a superannuation contribution payable to a fund in respect of services rendered by the employee.”.

6  After subsection 596AA(2)

Insert:

(2A) For the purposes of subsection (2), an entitlement of an employee need not be owed to the employee. It might, for example, be:

(a) an amount owed to the employee’s dependants; or
(b) a superannuation contribution payable to a fund in respect of services rendered by the employee; or
(c) a right in relation to an entitlement that becomes a right of the Commonwealth under paragraph 31(1)(b) of the Fair Entitlements Guarantee Act 2012; or
(d) an entitlement in relation to which an entity other than the employee has a right of subrogation.

7  Section 596AB (heading)

Repeal the heading, substitute:

596AB  Entering into relevant agreements or transactions to avoid employee entitlements—offence

8  Subsections 596AB(1) and (2)

Repeal the sections, substitute:

(1) A person contravenes this subsection if the person enters into a relevant agreement or a transaction with the intention of, or with intentions that include the intention of:

(a) preventing the recovery of the entitlements of employees of a company; or
(b) significantly reducing the amount of the entitlements of employees of a company that can be recovered.

Note: A contravention of this subsection is an offence (see subsection 1311(1)).

(1A) A person contravenes this subsection if:

(a) the person enters into a relevant agreement or a transaction; and

(b) the relevant agreement or the transaction is, in all the circumstances, reasonably likely to:

(i) prevent the recovery of the entitlements of employees of a company; or

(ii) significantly reduce the amount of the entitlements of employees of a company that can be recovered.

Note 1: A contravention of this subsection is an offence (see subsection 1311(1)).

Note 2: The fault element for the physical element in paragraph (b) is recklessness: see section 5.6 of the Criminal Code.

(2) Subsections (1) and (1A) apply even if:

(a) the company is not a party to the relevant agreement or the transaction; or

(b) the relevant agreement or the transaction is approved by a court; or

(c) despite the relevant agreement or the transaction, the entitlements of the employees of the company are recovered.

(2A) However, subsections (1) and (1A) do not apply if the relevant agreement or the transaction is, or is entered into for the purposes of, a deed of company arrangement executed by the company.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A): see subsection 13.3(3) of the Criminal Code.

9 At the end of subsection 596AB(3)

Add:

Note: A relevant agreement is an agreement, arrangement or understanding (see the definition of relevant agreement in section 9).
10 Subsection 596AB(4)

Repeal the subsection.

11 Section 596AC

Repeal the section, substitute:

596AC Entering into relevant agreements or transactions to avoid employee entitlements—civil contravention

(1) A person contravenes this subsection if:

(a) the person enters into a relevant agreement or a transaction (within the meaning of subsection 596AB(3)); and

(b) the person knows, or a reasonable person in the position of the person would know, that the relevant agreement or the transaction is likely to:

(i) prevent the recovery of the entitlements of employees of a company; or

(ii) significantly reduce the amount of the entitlements of employees of a company that can be recovered; and

(c) after the relevant agreement or the transaction is entered into, a liquidator of the company is appointed.

Note: This subsection is a civil penalty provision (see section 1317E).

(2) Subsection (1) applies even if:

(a) the company is not a party to the relevant agreement or the transaction; or

(b) the relevant agreement or the transaction is approved by a court; or

(c) despite the relevant agreement or the transaction, the entitlements of the employees of the company are recovered.

(3) However, subsection (1) does not apply if the relevant agreement or the transaction is, or is entered into for the purposes of, a deed of company arrangement executed by the company.

(4) If a person contravenes this section by incurring a debt (within the meaning of section 588G), the incurring of the debt and the contravention are linked for the purposes of this Act.
596ACA Person who contravenes section 596AC liable to compensate for loss

(1) A person is liable to pay compensation under subsection (3) or (4) if:
   (a) the person contravenes subsection 596AC(1) in relation to the entitlements of employees of a company by entering into a relevant agreement or a transaction (within the meaning of subsection 596AB(3)); and
   (b) employees of the company suffer loss or damage because of the relevant agreement or the transaction, or because of action taken to give effect to the relevant agreement or the transaction; and
   (c) a liquidator of the company is, or has been, appointed, or the company has been wound up.

(2) The person may be liable whether or not:
   (a) a Court has made a declaration of contravention or a pecuniary penalty order under Part 9.4B that applies to the person in relation to the contravention; or
   (b) the person has been convicted of an offence based on section 596AB in relation to the matters giving rise to the contravention.

(3) The company’s liquidator may recover from the person, as a debt due to the company, an amount equal to the loss or damage referred to in paragraph (1)(b).

(4) An employee who suffers loss or damage referred to in paragraph (1)(b) may, as provided in section 596AF (but not otherwise), recover from the person, as a debt due to the employee, an amount equal to the amount of the loss or damage.

(5) Any amount recovered under subsection (4) is to be taken into account in working out the amount for which the employee may prove in the liquidation of the company.

(6) Proceedings under this section may only be begun within 6 years after the first appointment of a liquidator of the company.
12 Section 596AD

Omit “section 596AC in relation to a contravention of section 596AB”, substitute “section 596ACA in relation to a contravention of subsection 596AC(1)”.

13 At the end of section 596AD

Add:
; and (c) proceedings under section 588ZA in relation to the contravention; and
(d) proceedings under section 1317H in relation to the contravention.

14 Section 596AE (heading)

Repeal the heading, substitute:

596AE Effect of section 596ACA

15 Section 596AE

Omit “Section 596AC”, substitute “Section 596ACA”.

16 Sections 596AF to 596AI

Repeal the sections, substitute:

596AF Proceedings for compensation

(1) Subject to section 596AG and to subsection (2) of this section, any of the following may begin proceedings under section 596ACA for compensation to be paid under subsection 596ACA(3) or (4) in relation to a contravention of subsection 596AC(1):
(a) the Commissioner of Taxation;
(b) the Fair Work Ombudsman;
(c) the Secretary of the Department administered by the Minister who administers the Fair Entitlements Guarantee Act 2012;
(d) an employee of the company.
If liquidator appointed, application requires consent or leave

(2) If a liquidator is appointed to the company, an application may be made under subsection (1) only:

(a) if the liquidator has given written consent to the applicant for the application to be made; or

(b) with the leave of the Court.

(3) The Court may give leave under paragraph (2)(b) only if:

(a) the applicant has given a written notice to the liquidator asking the liquidator to give consent under paragraph (2)(a); and

(b) either:

(i) the liquidator has given written notice to the applicant refusing to give consent under paragraph (2)(a); or

(ii) more than 30 days have passed since the notice under paragraph (a) of this subsection was given; and

(c) the Court is satisfied that it is appropriate to give leave, having regard to the following matters:

(i) whether it is likely that the liquidator, or any other person, will begin proceedings under section 596ACA in relation to the compensation;

(ii) any other matter that the Court considers relevant.

596AG Events preventing proceedings

(1) Proceedings cannot be begun under section 596AF in relation to a company and a contravention of subsection 596AC(1) if:

(a) the company’s liquidator has applied under section 588FF in relation to a transaction that constituted, or was part of, the contravention; or

(b) the company’s liquidator has intervened in an application for a civil penalty order against a person in relation to a contravention of section 588G in relation to the incurring of the debt that is linked to the contravention; or

(c) the company’s liquidator has begun proceedings under section 588M in relation to the incurring of the debt that is linked to the contravention; or
(d) the company’s liquidator has begun proceedings under section 596ACA in relation to the contravention.

(2) An employee of a company that is being wound up cannot begin proceedings under section 596ACA in relation to a contravention of subsection 596AC(1) if a person mentioned in paragraph 596AF(1)(a), (b) or (c) has begun proceedings under section 596ACA in relation to the contravention.

596AH Joining parties to proceedings

(1) If a company’s liquidator has begun proceedings under section 596ACA, any of the following may apply to the Court for leave to be joined as a party to the proceedings:

(a) the Commissioner of Taxation;
(b) the Fair Work Ombudsman;
(c) the Secretary of the Department administered by the Minister who administers the Fair Entitlements Guarantee Act 2012;
(d) an employee of the company.

(2) If a person mentioned in paragraph (1)(a), (b) or (c) has begun proceedings under section 596ACA, any of the following may apply to the Court for leave to be joined as a party to the proceedings:

(a) another person mentioned in paragraph (1)(a), (b) or (c);
(b) an employee of the company to which the proceedings relate;
(c) the company’s liquidator.

17 Subsection 1317E(1) (after table item 6)

Insert:

6A subsection 596AC(1) avoiding employee entitlements

18 Schedule 3 (table item 145)

Repeal the item, substitute:

145 Subsections 596AB(1) and (1A) In the case of an individual,
imprisonment for 10 years or a fine of the greater of the following:
(a) 4,500 penalty units;
(b) if the court can determine the total value of the benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence—3 times that total value;
or both.
In the case of a body corporate, a fine of the greatest of the following:
(a) 45,000 penalty units;
(b) if the court can determine the total value of the benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence—3 times that total value;
(c) if the court cannot determine the total value of those benefits—10% of the body corporate’s annual turnover during the 12-month period ending at the end of the month in which the body corporate committed, or began committing, the offence.
Part 2—Contribution orders

Corporations Act 2001

19 At the end of Part 5.7B

Add:

Division 8—Employee entitlements contribution orders

588ZA Employee entitlements contribution orders

Making of employee entitlements contribution order

(1) The Court may make an order under subsection (2) (an employee entitlements contribution order) in relation to an entity (the contributing entity) if the Court is satisfied that:

(a) a company (the insolvent company) is being wound up; and
(b) an amount (the unpaid entitlements amount) of the entitlements of one or more employees of the insolvent company that are protected under Part 5.8A has not been paid; and
(c) the contributing entity is a member of the same contribution order group as the insolvent company; and
(d) the contributing entity has benefited, directly or indirectly, from work done by those employees; and
(e) it is just and equitable to make the order.

(2) For the purposes of subsection (1), the Court may order the contributing entity to pay to the liquidator of the insolvent company an amount that:

(a) reflects the benefit obtained by the contributing entity from work done by the employees, to the extent that the benefit exceeds the benefit that would be reasonable in the circumstances if the insolvent company and the contributing entity were dealing at arm’s length; and
(b) does not, together with any other payments required to be 
made in respect of the unpaid entitlements amount by the 
order, exceed the unpaid entitlements amount.

(3) The Court may make any other orders, and give any directions, that 
it considers appropriate for the purposes of giving effect to an 
employee entitlements contribution order.

Contribution order group

(4) For the purposes of subsection (1), 2 entities are members of the 
same contribution order group if:

(a) one of the entities is, or has been, a related body corporate of 
the other entity; or

(b) one of the entities is, or has been, a related body corporate of 
a body corporate that is, or has been, a related body corporate 
of the other entity; or

(c) one of the entities is, or has been, controlled by the other 
entity or a related body corporate of the other entity; or

(d) one of the entities represents to the public that it is related to 
the other entity; or

(e) both entities are part of the same consolidated entity; or

(f) both entities are part of a collection of entities that functions 
as a single economic group.

Standing

(5) The Court may only make an employee entitlements contribution 
order on the application of:

(a) the liquidator of the insolvent company; or

(b) the Commissioner of Taxation; or

(c) the Fair Work Ombudsman; or

(d) the Secretary of the Department administered by the Minister 
Part 3—Disqualification from managing corporations

Corporations Act 2001

20 Subsection 201B(2)
Omit “section 206F”, substitute “section 206GAB”.

21 Section 203B
Omit “sections 206F”, substitute “sections 206GAB”.

22 Subsection 204B(2)
Omit “section 206F”, substitute “section 206GAB”.

23 Section 204G
Omit “sections 206F”, substitute “sections 206GAB”.

24 Subsections 206A(1B) and (2)
Omit “section 206F”, substitute “section 206GAB”.

25 After section 206EAA
Insert:

206EAB Court power of disqualification—unrecovered payments under government employee entitlements schemes
(1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:
(a) within the last 10 years, subsection (2) has applied to the person in relation to 2 or more corporations; and
(b) the Court is satisfied that the disqualification is justified.

(2) This subsection applies to a person in relation to a corporation if:
(a) the person is or has been an officer of the corporation; and
(b) while the person is an officer of the corporation, or within 12 months after the person ceased to be an officer of the
corporation, money is advanced for the purposes of paying
the entitlements of employees of the corporation under the
Fair Entitlements Guarantee Act 2012; and
(c) the Commonwealth receives a minimal return on the
advance; and
(d) either of the following applies:
   (i) the corporation contravened this Act or the
       Corporations (Aboriginal and Torres Strait Islander)
       Act 2006 while the person was an officer of the
corporation and the person failed to take reasonable
steps to prevent the contravention;
   (ii) the person contravened this Act or the Corporations
       (Aboriginal and Torres Strait Islander) Act 2006 while
       the person was an officer of the corporation.

(3) For the purposes of paragraph (2)(c), the Commonwealth receives
a minimal return on an advance under the Fair Entitlements
Guarantee Act 2012 if the amount of the advance recovered by the
Commonwealth is nil, or is 10 cents in the dollar or less.

Note: For recovery of advances paid under the Fair Entitlements Guarantee
Act 2012, see Part 5 of that Act.

(4) To avoid doubt, the references in subsection (2) to a corporation
include references to an Aboriginal and Torres Strait Islander
corporation.

26 Subsection 206F(5)
Repeal the subsection.

27 Before section 206G
Insert:

206GAA ASIC’s power of disqualification—unrecovered payments
under government employee entitlements schemes

(1) ASIC may disqualify a person from managing corporations for up
to 10 years if:
   (a) within the last 10 years, subsection (2) has applied to the
       person in relation to 2 or more corporations; and
(b) ASIC has given the person:
   (i) a notice in the prescribed form requiring them to
demonstrate why they should not be disqualified; and
   (ii) an opportunity to be heard on the question; and

(c) ASIC is satisfied that the disqualification is justified.

(2) This subsection applies to a person in relation to a corporation if:
   (a) the person is or has been an officer of the corporation; and
   (b) while the person is an officer of the corporation, or within 12
       months after the person ceased to be an officer of the
       corporation, money is advanced for the purposes of paying
       the entitlements of employees of the corporation under the
       *Fair Entitlements Guarantee Act 2012*; and
   (c) the Commonwealth receives a minimal return on the
       advance; and
   (d) either of the following applies:
       (i) the corporation contravened this Act or the
           *Corporations (Aboriginal and Torres Strait Islander)*
           Act 2006 while the person was an officer of the
           corporation and the person failed to take reasonable
           steps to prevent the contravention;
       (ii) the person contravened this Act or the *Corporations*
           *(Aboriginal and Torres Strait Islander)* Act 2006 while
           the person was an officer of the corporation.

(3) For the purposes of paragraph (2)(c), the Commonwealth receives
a minimal return on an advance under the *Fair Entitlements
Guarantee Act 2012* if the amount of the advance recovered by the
Commonwealth is nil, or is 10 cents in the dollar or less.

Note: For recovery of advances paid under the *Fair Entitlements

(4) In determining whether the disqualification is justified, ASIC may
have regard to:
   (a) the person’s conduct in relation to the management, business
       or property of any corporation; and
   (b) whether the disqualification would be in the public interest; and
(c) any other matters that ASIC considers appropriate.

(5) To avoid doubt, the references in subsections (2) and (4) to a corporation include references to an Aboriginal and Torres Strait Islander corporation.

Notice of disqualification

(6) If ASIC disqualifies a person from managing corporations under this section, ASIC must serve a notice on the person advising them of the disqualification. The notice must be in the prescribed form.

Start of disqualification

(7) The disqualification takes effect from the time when a notice referred to in subsection (6) is served on the person.

206GAB ASIC power to grant leave

ASIC may give a person who it has disqualified from managing corporations under this Part written permission to manage a particular corporation or corporations. The permission may be expressed to be subject to conditions and exceptions determined by ASIC.

28 Paragraph 1274AA(1)(a)

Omit “206EA, 206EB or 206F”, substitute “206EAB, 206EA, 206EB, 206F or 206GAA”.

29 After paragraph 1274AA(2)(ab)

Insert:

(aba) every court order referred to in section 206EAB; and

30 Paragraph 1274AA(2)(c)

Repeal the paragraph, substitute:

(c) every notice that was served under subsection 206GAA(6); and

(ca) each permission given under section 206GAB; and
Part 4—Transitional provisions

Corporations Act 2001

31 In the appropriate position in Chapter 10

Insert:

Part 10.34—Transitional provisions relating to the Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2018

1647 Application—protection of employee entitlements

The amendments made by Part 1 of Schedule 1 to the Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2018 apply in relation to a relevant agreement or a transaction that is entered into on or after the commencement of that Part.

1648 Application—contribution orders

The amendment made by Part 2 of Schedule 1 to the Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2018 applies in relation to the winding up of a company that begins on or after the commencement of that Part.

1649 Application—director disqualification

(1) The period of 10 years referred to in paragraphs 206EAB(1)(a) and 206GAA(1)(a) may include any period that is not more than 5 years before the commencement of Part 3 of Schedule 1 to the Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2018 (subject to the time limit of 10 years in those paragraphs).
(2) A permission given under subsection 206F(5) that was in force immediately before the commencement of Part 3 of Schedule 1 to the Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2018 continues in force (and may be dealt with) as if it had been given under section 206GAB as inserted by that Part.