

EXPOSURE DRAFT

2016-2017-2018

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

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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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1 column 2 of the table. Any other statement in column 2 has effect
2 according to its terms.

3

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	The day after this Act receives the Royal Assent.	

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

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

10 3 Schedules

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12 repealed as set out in the applicable items in the Schedule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

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Amendments **Schedule 1**
Employee entitlements **Part 1**

1 **Schedule 1—Amendments**

2 **Part 1—Employee entitlements**

3 *Corporations Act 2001*

4 **1 Section 9 (definition of *linked*)**

5 Omit “section 596AB are *linked* if they are linked under
6 subsection 596AB(4)”, substitute “subsection 596AC(1) are *linked* if
7 they are linked under subsection 596AC(4)”.

8 **2 Paragraph 588N(b)**

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

12 **3 Section 596AA (heading)**

13 Repeal the heading, substitute:

14 **596AA Objects and coverage of this Part**

15 **4 Subsection 596AA(1)**

16 Repeal the subsection, substitute:

17 *Objects*

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

25 Note: For example, this Part may apply:

- 26 (a) where the owner or owners of a company remove assets from the
27 company before it is wound up, resulting in the company being
28 unable to pay the entitlements of its employees; or

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Schedule 1 Amendments

Part 1 Employee entitlements

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

4 **5 Subsection 596AA(2)**

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

9 **6 After subsection 596AA(2)**

10 Insert:

- 11 (2A) For the purposes of subsection (2), an entitlement of an employee
12 need not be owed to the employee. It might, for example, be:
13 (a) an amount owed to the employee’s dependants; or
14 (b) a superannuation contribution payable to a fund in respect of
15 services rendered by the employee; or
16 (c) a right in relation to an entitlement that becomes a right of
17 the Commonwealth under paragraph 31(1)(b) of the *Fair*
18 *Entitlements Guarantee Act 2012*; or
19 (d) an entitlement in relation to which an entity other than the
20 employee has a right of subrogation.

21 **7 Section 596AB (heading)**

22 Repeal the heading, substitute:

23 **596AB Entering into relevant agreements or transactions to avoid** 24 **employee entitlements—offence**

25 **8 Subsections 596AB(1) and (2)**

26 Repeal the sections, substitute:

- 27 (1) A person contravenes this subsection if the person enters into a
28 relevant agreement or a transaction with the intention of, or with
29 intentions that include the intention of:
30 (a) preventing the recovery of the entitlements of employees of a
31 company; or

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Amendments **Schedule 1**
Employee entitlements **Part 1**

1 (b) significantly reducing the amount of the entitlements of
2 employees of a company that can be recovered.

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

5 (1A) A person contravenes this subsection if:

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

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

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

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

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

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

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

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

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

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

25 (2A) However, subsections (1) and (1A) do not apply if the relevant
26 agreement or the transaction is, or is entered into for the purposes
27 of, a deed of company arrangement executed by the company.

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

30 **9 At the end of subsection 596AB(3)**

31 Add:

32 Note: A relevant agreement is an agreement, arrangement or understanding
33 (see the definition of *relevant agreement* in section 9).

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Schedule 1 Amendments

Part 1 Employee entitlements

1 **12 Section 596AD**

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

5 **13 At the end of section 596AD**

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

11 **14 Section 596AE (heading)**

12 Repeal the heading, substitute:

13 **596AE Effect of section 596ACA**

14 **15 Section 596AE**

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

16 **16 Sections 596AF to 596AI**

17 Repeal the sections, substitute:

18 **596AF Proceedings for compensation**

19 (1) Subject to section 596AG and to subsection (2) of this section, any
20 of the following may begin proceedings under section 596ACA for
21 compensation to be paid under subsection 596ACA(3) or (4) in
22 relation to a contravention of subsection 596AC(1):
23 (a) the Commissioner of Taxation;
24 (b) the Fair Work Ombudsman;
25 (c) the Secretary of the Department administered by the Minister
26 who administers the *Fair Entitlements Guarantee Act 2012*;
27 (d) an employee of the company.

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Amendments **Schedule 1**
Employee entitlements **Part 1**

- 1 *If liquidator appointed, application requires consent or leave*
- 2 (2) If a liquidator is appointed to the company, an application may be
- 3 made under subsection (1) only:
- 4 (a) if the liquidator has given written consent to the applicant for
- 5 the application to be made; or
- 6 (b) with the leave of the Court.
- 7 (3) The Court may give leave under paragraph (2)(b) only if:
- 8 (a) the applicant has given a written notice to the liquidator
- 9 asking the liquidator to give consent under paragraph (2)(a);
- 10 and
- 11 (b) either:
- 12 (i) the liquidator has given written notice to the applicant
- 13 refusing to give consent under paragraph (2)(a); or
- 14 (ii) more than 30 days have passed since the notice under
- 15 paragraph (a) of this subsection was given; and
- 16 (c) the Court is satisfied that it is appropriate to give leave,
- 17 having regard to the following matters:
- 18 (i) whether it is likely that the liquidator, or any other
- 19 person, will begin proceedings under section 596ACA
- 20 in relation to the compensation;
- 21 (ii) any other matter that the Court considers relevant.

22 **596AG Events preventing proceedings**

- 23 (1) Proceedings cannot be begun under section 596AF in relation to a
- 24 company and a contravention of subsection 596AC(1) if:
- 25 (a) the company's liquidator has applied under section 588FF in
- 26 relation to a transaction that constituted, or was part of, the
- 27 contravention; or
- 28 (b) the company's liquidator has intervened in an application for
- 29 a civil penalty order against a person in relation to a
- 30 contravention of section 588G in relation to the incurring of
- 31 the debt that is linked to the contravention; or
- 32 (c) the company's liquidator has begun proceedings under
- 33 section 588M in relation to the incurring of the debt that is
- 34 linked to the contravention; or

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Schedule 1 Amendments

Part 1 Employee entitlements

1 (d) the company's liquidator has begun proceedings under
2 section 596ACA in relation to the contravention.

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

8 **596AH Joining parties to proceedings**

- 9 (1) If a company's liquidator has begun proceedings under
10 section 596ACA, any of the following may apply to the Court for
11 leave to be joined as a party to the proceedings:
12 (a) the Commissioner of Taxation;
13 (b) the Fair Work Ombudsman;
14 (c) the Secretary of the Department administered by the Minister
15 who administers the *Fair Entitlements Guarantee Act 2012*;
16 (d) an employee of the company.
- 17 (2) If a person mentioned in paragraph (1)(a), (b) or (c) has begun
18 proceedings under section 596ACA, any of the following may
19 apply to the Court for leave to be joined as a party to the
20 proceedings:
21 (a) another person mentioned in paragraph (1)(a), (b) or (c);
22 (b) an employee of the company to which the proceedings relate;
23 (c) the company's liquidator.

24 **17 Subsection 1317E(1) (after table item 6)**

25 Insert:

26 6A subsection 596AC(1) avoiding employee entitlements
27

28 **18 Schedule 3 (table item 145)**

29 Repeal the item, substitute:

30 145 Subsections 596AB(1) and (1A) In the case of an individual,

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Amendments **Schedule 1**
Employee entitlements **Part 1**

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.

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Schedule 1 Amendments
Part 2 Contribution orders

1 **Part 2—Contribution orders**

2 *Corporations Act 2001*

3 **19 At the end of Part 5.7B**

4 Add:

5 **Division 8—Employee entitlements contribution orders**

6 **588ZA Employee entitlements contribution orders**

7 *Making of employee entitlements contribution order*

- 8 (1) The Court may make an order under subsection (2) (an *employee*
9 *entitlements contribution order*) in relation to an entity (the
10 *contributing entity*) if the Court is satisfied that:
- 11 (a) a company (the *insolvent company*) is being wound up; and
 - 12 (b) an amount (the *unpaid entitlements amount*) of the
13 entitlements of one or more employees of the insolvent
14 company that are protected under Part 5.8A has not been
15 paid; and
 - 16 (c) the contributing entity is a member of the same contribution
17 order group as the insolvent company; and
 - 18 (d) the contributing entity has benefited, directly or indirectly,
19 from work done by those employees; and
 - 20 (e) it is just and equitable to make the order.
- 21 (2) For the purposes of subsection (1), the Court may order the
22 contributing entity to pay to the liquidator of the insolvent
23 company an amount that:
- 24 (a) reflects the benefit obtained by the contributing entity from
25 work done by the employees, to the extent that the benefit
26 exceeds the benefit that would be reasonable in the
27 circumstances if the insolvent company and the contributing
28 entity were dealing at arm's length; and

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Amendments **Schedule 1**
Contribution orders **Part 2**

- 1 (b) does not, together with any other payments required to be
2 made in respect of the unpaid entitlements amount by the
3 order, exceed the unpaid entitlements amount.
- 4 (3) The Court may make any other orders, and give any directions, that
5 it considers appropriate for the purposes of giving effect to an
6 employee entitlements contribution order.

7 *Contribution order group*

- 8 (4) For the purposes of subsection (1), 2 entities are *members of the*
9 *same contribution order group* if:
- 10 (a) one of the entities is, or has been, a related body corporate of
11 the other entity; or
- 12 (b) one of the entities is, or has been, a related body corporate of
13 a body corporate that is, or has been, a related body corporate
14 of the other entity; or
- 15 (c) one of the entities is, or has been, controlled by the other
16 entity or a related body corporate of the other entity; or
- 17 (d) one of the entities represents to the public that it is related to
18 the other entity; or
- 19 (e) both entities are part of the same consolidated entity; or
- 20 (f) both entities are part of a collection of entities that functions
21 as a single economic group.

22 *Standing*

- 23 (5) The Court may only make an employee entitlements contribution
24 order on the application of:
- 25 (a) the liquidator of the insolvent company; or
- 26 (b) the Commissioner of Taxation; or
- 27 (c) the Fair Work Ombudsman; or
- 28 (d) the Secretary of the Department administered by the Minister
29 who administers the *Fair Entitlements Guarantee Act 2012*.

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Schedule 1 Amendments

Part 3 Disqualification from managing corporations

1 **Part 3—Disqualification from managing corporations**

2 *Corporations Act 2001*

3 **20 Subsection 201B(2)**

4 Omit “section 206F”, substitute “section 206GAB”.

5 **21 Section 203B**

6 Omit “sections 206F”, substitute “sections 206GAB”.

7 **22 Subsection 204B(2)**

8 Omit “section 206F”, substitute “section 206GAB”.

9 **23 Section 204G**

10 Omit “sections 206F”, substitute “sections 206GAB”.

11 **24 Subsections 206A(1B) and (2)**

12 Omit “section 206F”, substitute “section 206GAB”.

13 **25 After section 206EAA**

14 Insert:

15 **206EAB Court power of disqualification—unrecovered payments**
16 **under government employee entitlements schemes**

17 (1) On application by ASIC, the Court may disqualify a person from
18 managing corporations for a period that the Court considers
19 appropriate if:

- 20 (a) within the last 10 years, subsection (2) has applied to the
21 person in relation to 2 or more corporations; and
22 (b) the Court is satisfied that the disqualification is justified.

23 (2) This subsection applies to a person in relation to a corporation if:

- 24 (a) the person is or has been an officer of the corporation; and
25 (b) while the person is an officer of the corporation, or within 12
26 months after the person ceased to be an officer of the

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- 1 corporation, money is advanced for the purposes of paying
2 the entitlements of employees of the corporation under the
3 *Fair Entitlements Guarantee Act 2012*; and
4 (c) the Commonwealth receives a minimal return on the
5 advance; and
6 (d) either of the following applies:
7 (i) the corporation contravened this Act or the
8 *Corporations (Aboriginal and Torres Strait Islander)*
9 *Act 2006* while the person was an officer of the
10 corporation and the person failed to take reasonable
11 steps to prevent the contravention;
12 (ii) the person contravened this Act or the *Corporations*
13 *(Aboriginal and Torres Strait Islander) Act 2006* while
14 the person was an officer of the corporation.
- 15 (3) For the purposes of paragraph (2)(c), the Commonwealth receives
16 a minimal return on an advance under the *Fair Entitlements*
17 *Guarantee Act 2012* if the amount of the advance recovered by the
18 Commonwealth is nil, or is 10 cents in the dollar or less.
- 19 Note: For recovery of advances paid under the *Fair Entitlements Guarantee*
20 *Act 2012*, see Part 5 of that Act.
- 21 (4) To avoid doubt, the references in subsection (2) to a corporation
22 include references to an Aboriginal and Torres Strait Islander
23 corporation.

26 Subsection 206F(5)

24 Repeal the subsection.

27 Before section 206G

26 Insert:

28 **206GAA ASIC's power of disqualification—unrecovered payments** 29 **under government employee entitlements schemes**

- 30 (1) ASIC may disqualify a person from managing corporations for up
31 to 10 years if:
32 (a) within the last 10 years, subsection (2) has applied to the
33 person in relation to 2 or more corporations; and
-

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Schedule 1 Amendments

Part 3 Disqualification from managing corporations

- 1 (b) ASIC has given the person:
2 (i) a notice in the prescribed form requiring them to
3 demonstrate why they should not be disqualified; and
4 (ii) an opportunity to be heard on the question; and
5 (c) ASIC is satisfied that the disqualification is justified.
- 6 (2) This subsection applies to a person in relation to a corporation if:
7 (a) the person is or has been an officer of the corporation; and
8 (b) while the person is an officer of the corporation, or within 12
9 months after the person ceased to be an officer of the
10 corporation, money is advanced for the purposes of paying
11 the entitlements of employees of the corporation under the
12 *Fair Entitlements Guarantee Act 2012*; and
13 (c) the Commonwealth receives a minimal return on the
14 advance; and
15 (d) either of the following applies:
16 (i) the corporation contravened this Act or the
17 *Corporations (Aboriginal and Torres Strait Islander)*
18 *Act 2006* while the person was an officer of the
19 corporation and the person failed to take reasonable
20 steps to prevent the contravention;
21 (ii) the person contravened this Act or the *Corporations*
22 *(Aboriginal and Torres Strait Islander) Act 2006* while
23 the person was an officer of the corporation.
- 24 (3) For the purposes of paragraph (2)(c), the Commonwealth receives
25 a minimal return on an advance under the *Fair Entitlements*
26 *Guarantee Act 2012* if the amount of the advance recovered by the
27 Commonwealth is nil, or is 10 cents in the dollar or less.
- 28 Note: For recovery of advances paid under the *Fair Entitlements Guarantee*
29 *Act 2012*, see Part 5 of that Act.
- 30 (4) In determining whether the disqualification is justified, ASIC may
31 have regard to:
32 (a) the person's conduct in relation to the management, business
33 or property of any corporation; and
34 (b) whether the disqualification would be in the public interest;
35 and
-

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Amendments **Schedule 1**
Disqualification from managing corporations **Part 3**

1 (c) any other matters that ASIC considers appropriate.

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

5 *Notice of disqualification*

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

9 *Start of disqualification*

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

12 **206GAB ASIC power to grant leave**

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

18 **28 Paragraph 1274AA(1)(a)**

19 Omit “206EA, 206EB or 206F”, substitute “206EAB, 206EA, 206EB,
20 206F or 206GAA”.

21 **29 After paragraph 1274AA(2)(ab)**

22 Insert:

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

24 **30 Paragraph 1274AA(2)(c)**

25 Repeal the paragraph, substitute:

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

28 (ca) each permission given under section 206GAB; and

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Schedule 1 Amendments

Part 4 Transitional provisions

1 **Part 4—Transitional provisions**

2 *Corporations Act 2001*

3 **31 In the appropriate position in Chapter 10**

4 Insert:

5 **Part 10.34—Transitional provisions relating to the**
6 **Corporations Amendment (Strengthening**
7 **Protections for Employee Entitlements) Act**
8 **2018**
9

10 **1647 Application—protection of employee entitlements**

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

15 **1648 Application—contribution orders**

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

20 **1649 Application—director disqualification**

21 (1) The period of 10 years referred to in paragraphs 206EAB(1)(a) and
22 206GAA(1)(a) may include any period that is not more than 5
23 years before the commencement of Part 3 of Schedule 1 to the
24 *Corporations Amendment (Strengthening Protections for Employee*
25 *Entitlements) Act 2018* (subject to the time limit of 10 years in
26 those paragraphs).

