

CORPORATIONS AMENDMENT (SIMILAR NAMES) BILL 2012

The Corporations Amendment (Similar Names) Bill 2012 (the Bill) amends the Corporations Act to:

- provide that a director of a failed company can be jointly and individually liable for the debts of a company that has a similar name to a pre-liquidation name of the failed company ('similar names measure').

The similar names measure is an election commitment from the Government's Protecting Workers' Entitlements Package announced in July 2010.

PERSONAL LIABILITY OF DIRECTORS FOR THE DEBTS OF CERTAIN COMPANIES

- Phoenix activity is generally considered to have occurred when directors of a company misuse the corporate form with the intention of denying unsecured creditors access to the company's assets in order to meet their unpaid debts. Shortly after the company fails, a new company commences trading and uses some or all of the assets of the former company. The new entity is commonly controlled by the directors or controllers of the failed company, or parties related to them. Often the process is repeated leading to further losses for creditors.
- This phoenix activity contrasts with a genuine business failure where the business has been responsibly managed and subsequently continues using another corporate entity in a legitimate use of the corporate form.
- Those involved in phoenix company activity exploit the concept of limited liability. The concept of limited liability is a long established principle of company law, such that when a company fails, ordinarily those behind the company (directors, shareholders) are not liable for the company's debts.
- The use of a similar trading name by a successor company can be an indicator of phoenix activity. The purpose of the similar names measure is to specifically target phoenix activity where a director(s) seek appointment to a similarly named company to the failed company, so as to create the impression that the similarly named company is a continuation of the failed company.
- The Bill would amend the Corporations Act to provide that a director of a failed company can be jointly and individually liable for the debts of a company that has a similar name to a pre-liquidation name of the failed company.
- A pre - liquidation name is any name in which the company was known in the year leading up to the winding up of the failed company. [clause 596AP]
- A company is known by its actual name or any name it uses to carry on business. This includes business names and company names. [clause 596AQ]

- A failed company is defined as:
 - a company that has been wound up; and
 - an unsecured debt or claim was proved in the winding up; and
 - the relevant date in the winding up is after the commencement of this Bill. [clause 596AO]
- Clause 596AJ imposes liability on a person for debts incurred by a debtor company if:
 - a person is a director of the debtor company when the debt was incurred;
 - the person has been a director during the 12 month period prior to the winding up of the failed company;
 - the debtor company has a name that is similar (or the same) as the failed company;
 - the debt was incurred within five years of the start of the winding up of the failed company; and
 - the debt is incurred after the commencement of the Bill
- A debtor company refers to a similarly named company. [clause 596AJ (1) (c)]
- Liability for the debt is both joint and individual. [clause 596AJ (2)]

EXEMPTION FROM LIABILITY

- Directors who act honestly and without the intention of seeking to avoid paying creditors can apply to the Court, or to the liquidator of the failed company to seek that they be exempt from liability.
- A person will not be liable under section 596AJ if they fall within one of the exemptions in Clauses 596AK and 596AL or the failed company has paid all of its debts.

Exemption for a person covered by a Court Order

- A person can seek an order from the Court exempting them from liability for some or all of the debts of the failed company to which the person is otherwise liable under Clause 596AJ. Liability can be relieved both prospectively and after the event. [Clause 596AK(1)]
- The Court can grant the exemption with conditions. [Clause 596AK(2)]
- The Court can only make an order if the Court considers that the person has acted honestly and that in all circumstances it is fair that the person not be liable for some or all of the debts of the failed company. [Clause 596AK(3)]
- The Court must consider that during the directors involvement with the failed company and the debtor company, the extent to which the companies share assets, employees,

premises and the other factors listed in Clause 596AK (b) to (f). These criteria have been chosen as they are often indicators of phoenix company behaviour. [Clause 596AK(4)]

- The Court must also consider any other relevant factors.
- The person seeking an exemption from the Court is also required to lodge a copy of the notice seeking the exemption with ASIC. [Clause 596AK(5)]

Exemption granted by the liquidator of a failed company

- This power is very similar to the Court's power under Clause 596AK.
- The liquidator is, however, subject to the Court. Under Clause 596AL(6), the liquidator is required not to exercise their powers contrary to the Court. [Clause 596AL(6)].
- There is an obligation on the person seeking relief to provide a copy of any applications or court orders that have already been made against a person to the liquidator.

Review rights

- Any decision by a liquidator under this section is subject to broad supervisory powers of the Court in relation to liquidators, receivers, receivers and managers and administrators.
 - Section 1321 of the Corporations Act provides that if a person is aggrieved by any act, omission or decision of a liquidator, they can apply to the Court and seek orders for the Court to reverse, modify or confirm the liquidator's decision and make any other orders the court sees fit.

Exemption for directors of Non-Dormant Companies

- This exemption applies to companies that have a similar name to the failed company that were carrying on business in the year prior to the failure of the failed company.
- It is common for persons to simultaneously be directors of a number of companies with a similar name.
- In circumstances where a director is simultaneously a director of a number of similarly named companies, if one was to fail, they could be liable under clause 596AJ, as the director would be a director of a similarly named company to the failed company.
- This exemption provides that in such cases, where the similarly named company was carrying on business in the year prior to the failure of the failed company, the director will not be liable under clause 596AJ [Clause 596AM]

Failed company has paid all its debts

- If a failed company has paid all of its debts in full, a person cannot be liable under Clause 596AJ. [Clause 596AN]

Failed company

- As noted above, a failed company is one which has been wound up and an unsecured debt has been proved in the winding up.

- The Bill only applies to companies that are wound up after the commencement of the Bill.