



# **Corporations Amendment (Phoenixing and Other Measures) Act 2012**

**No. 48, 2012**

**An Act to amend the *Corporations Act 2001*, and for other purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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**An Act to amend the *Corporations Act 2001*, and for other purposes**

[Assented to 26 May 2012]

The Parliament of Australia enacts:

## **1 Short title**

This Act may be cited as the *Corporations Amendment (Phoenixing and Other Measures) Act 2012*.

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

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<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	26 May 2012
2. Schedules 1 and 2	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.	

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Note: This table relates only to the provisions of this Act as originally enacted.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

(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 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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—Winding up by ASIC**

#### *Corporations Act 2001*

##### **1 After Part 5.4B**

Insert:

### **Part 5.4C—Winding up by ASIC**

#### **489EA ASIC may order the winding up of a company**

- (1) ASIC may order the winding up of a company if:
  - (a) the response to a return of particulars given to the company is at least 6 months late; and
  - (b) the company has not lodged any other documents under this Act in the last 18 months; and
  - (c) ASIC has reason to believe that the company is not carrying on business; and
  - (d) ASIC has reason to believe that making the order is in the public interest.
- (2) ASIC may order the winding up of a company if the company's review fee in respect of a review date has not been paid in full at least 12 months after the due date for payment.
- (3) ASIC may order the winding up of a company if:
  - (a) ASIC has reinstated the registration of the company under subsection 601AH(1) in the last 6 months; and
  - (b) ASIC has reason to believe that making the order is in the public interest.
- (4) ASIC may order the winding up of a company if:
  - (a) ASIC has reason to believe that the company is not carrying on business; and
  - (b) at least 20 business days before making the order, ASIC gives to:

- (i) the company; and
- (ii) each director of the company;

a notice:

- (iii) stating ASIC's intention to make the order; and
- (iv) informing the company or the director, as the case may be, that the company or the director may, within 10 business days after the receipt of the notice, give ASIC a written objection to the making of the order; and

- (c) neither the company, nor any of its directors, has given ASIC such an objection within the time limit specified in the notice.

(5) Paragraphs (4)(b) and (c) do not apply to a person if ASIC does not have the necessary information about the person's identity or address.

(6) Before making an order under subsection (1), (2), (3) or (4), ASIC must:

- (a) give notice of its intention to make the order on ASIC database; and
- (b) both:
  - (i) publish notice of its intention to make the order; and
  - (ii) do so in the prescribed manner.

(7) ASIC must not order the winding up of a company under subsection (1), (2), (3) or (4) if an application is before the Court for the winding up of the company.

(8) Paragraph (b) of the definition of **director** in section 9 does not apply to subsection (4) of this section.

(9) To avoid doubt, subsections (1), (2), (3) and (4):

- (a) have effect independently of each other; and
- (b) do not limit each other.

#### **489EB Deemed resolution that company be wound up voluntarily**

If ASIC orders under section 489EA that a company be wound up:

- (a) the company is taken to have passed a special resolution under section 491 that the company be wound up voluntarily; and
- (b) the company is taken to have passed the special resolution:

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- (i) at the time when ASIC made the order under section 489EA; and
- (ii) without a declaration having been made and lodged under section 494; and
- (c) section 496 has effect as if:
  - (i) a declaration had been made under section 494; and
  - (ii) the reference in subsection 496(1) to the period stated in the declaration were a reference to the 12-month period beginning when ASIC made the order under section 489EA; and
- (d) section 497 is taken to have been complied with in relation to the winding up.

#### **489EC Appointment of liquidator**

- (1) If ASIC orders under section 489EA that a company be wound up, ASIC may:
  - (a) appoint a liquidator for the purpose of winding up the affairs and distributing the property of the company; and
  - (b) determine the remuneration to be paid to the liquidator.
- (2) An appointment of a liquidator by ASIC must not be made without the written consent of the liquidator.
- (3) A vacancy in the office of a liquidator appointed by ASIC is to be filled by the appointment of a liquidator by ASIC.

#### **2 At the end of section 601AA**

Add:

- (6) ASIC may refuse to deregister a company under this section if ASIC decides to order under section 489EA that the company be wound up.
- (7) Subsection (6) does not limit ASIC's power to refuse to deregister the company.

#### **3 At the end of section 601AB**

Add:

- (6) ASIC may refuse to deregister a company under this section if ASIC decides to order under section 489EA that the company be wound up.
- (7) Subsection (6) does not limit ASIC's power to refuse to deregister the company.

**4 After paragraph 1317C(c)**

Insert:

- (ca) a decision of ASIC to order the winding up of a company under section 489EA; or

## **Part 2—Publication requirements**

### ***Corporations Act 2001***

#### **5 Paragraph 412(1)(b)**

After “given by advertisement”, insert “or that is published in the prescribed manner”.

#### **6 Subsection 412(4)**

After “given by advertisement”, insert “, or published in the prescribed manner,”.

#### **7 Paragraph 436E(3)(b)**

Repeal the paragraph, substitute:

- (b) causing a notice setting out the prescribed information about the meeting to be published in the prescribed manner;

#### **8 Paragraph 439A(3)(b)**

Repeal the paragraph, substitute:

- (b) causing a notice setting out the prescribed information about the meeting to be published in the prescribed manner;

#### **9 Paragraph 446A(5)(b)**

Repeal the paragraph, substitute:

- (b) cause the notice to be published, within the period ascertained in accordance with the regulations, in the prescribed manner.

#### **10 Paragraph 449C(5)(b)**

Repeal the paragraph, substitute:

- (b) causing a notice setting out the prescribed information about the meeting to be published in the prescribed manner;

#### **11 Paragraph 450A(1)(b)**

Repeal the paragraph, substitute:

- (b) cause a notice setting out the prescribed information about the appointment to be published, within the period ascertained in accordance with the regulations, in the prescribed manner.

## **12 Paragraph 465A(c)**

Repeal the paragraph, substitute:

- (c) cause a notice setting out the prescribed information about the application to be published in the prescribed manner.

## **13 Paragraph 491(2)(b)**

Repeal the paragraph, substitute:

- (b) within the period ascertained in accordance with the regulations, cause a notice setting out the prescribed information about the resolution to be published in the prescribed manner.

## **14 Paragraph 497(2)(d)**

Repeal the paragraph, substitute:

- (d) both:
  - (i) publish in the prescribed manner a copy of the notice given or to be given under paragraph (a); and
  - (ii) do so within the period ascertained in accordance with the regulations.

## **15 Subsection 498(3)**

Omit “to be published, in a daily newspaper circulating generally in the State or Territory in which the resumed meeting is to be held,”, substitute “to be published in the prescribed manner”.

## **16 Subsection 509(2)**

Omit “an advertisement published in the *Gazette*”, substitute “a notice published in the prescribed manner”.

## **17 Subsection 568A(2)**

Repeal the subsection, substitute:

- (2) If paragraph (1)(c) applies, the liquidator must cause a notice setting out the prescribed information about the disclaimer to be published in the prescribed manner.

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## **18 Paragraph 589(3)(a)**

Omit “in the *Gazette*”, substitute “in the prescribed manner”.

## **19 Subsection 601AA(4)**

Repeal the subsection, substitute:

### *Deregistration procedure*

(4) If:

- (a) ASIC decides to deregister the company under this section; and
- (b) ASIC is not aware of any failure to comply with subsections (1) to (3);

ASIC must:

- (c) give notice of the proposed deregistration on ASIC database; and
- (d) publish notice of the proposed deregistration in the prescribed manner.

(4A) When 2 months have passed since the publication of the notice under paragraph (4)(d), ASIC may deregister the company.

## **20 Subsection 601AB(1) (heading)**

Repeal the heading, substitute:

### *Circumstances in which ASIC may deregister*

## **21 Subsection 601AB(3)**

Repeal the subsection, substitute:

### *Deregistration procedure*

(3) If ASIC decides to deregister a company under this section, it must:

- (a) give notice of the proposed deregistration:
  - (i) to the company; and
  - (ii) to the company’s liquidator (if any); and
  - (iii) to the company’s directors; and
  - (iv) on ASIC database; and

- (b) publish notice of the proposed deregistration in the prescribed manner.

(3A) When 2 months have passed since the publication of the notice under paragraph (3)(b), ASIC may deregister the company.

**22 Subsection 601AB(4)**

Omit “subsection (3)”, substitute “paragraph (3)(a)”.

**23 Subsection 601AB(5)**

Omit “paragraph (3)(b) or (c)”, substitute “subparagraph (3)(a)(ii) or (iii)”.

**24 Subparagraph 1351(4)(a)(i)**

Omit “subsection 601AA(4)”, substitute “paragraph 601AA(4)(c), and published notice of the proposed deregistration of the company in accordance with paragraph 601AA(4)(d)”.

**25 Subparagraph 1351(4)(a)(ii)**

Omit “relevant *Gazette* notice”, substitute “notice published in accordance with paragraph 601AA(4)(d)”.

**26 After section 1367**

Insert:

**1367A Publication in the prescribed manner**

- (1) If a particular provision of this Act requires a person (other than ASIC) to:
  - (a) publish a notice, or a copy of a notice, in the prescribed manner; or
  - (b) cause a notice, or a copy of a notice, to be published in the prescribed manner;the regulations may provide that:
  - (c) the person is taken to have complied with that requirement if, and only if, the person lodges the notice or copy under subsection (2); and
  - (d) if the person lodges the notice or copy under subsection (2), ASIC must publish the notice or copy in the manner specified in the regulations.

- (2) A person may lodge a notice, or a copy of a notice, under this subsection if the notice or copy is covered by regulations made for the purposes of subsection (1).

## **Part 3—Miscellaneous amendments**

### ***Corporations Act 2001***

#### **27 Section 9**

Insert:

*paid parental leave employer* has the meaning given by subsection 600AA(2).

#### **28 Before section 600A**

Insert:

#### **600AA Duty of receiver, administrator or liquidator—parental leave pay**

(1) A person who:

- (a) is appointed (whether or not by a court), and acts, as a receiver and manager in respect of property of a body corporate; or
- (b) is appointed as the administrator of a body corporate under Division 2 of Part 5.3A; or
- (c) is appointed as the liquidator or provisional liquidator of a body corporate;

must, as soon as possible, notify the Secretary (within the meaning of the *Paid Parental Leave Act 2010*) of the person's appointment, if the body corporate was a paid parental leave employer just before the appointment.

(2) A person is a *paid parental leave employer* at a particular time if:

- (a) the person must pay an instalment under section 72 of the *Paid Parental Leave Act 2010*; and
- (b) either:
  - (i) that time occurs during the instalment period (within the meaning of that Act) to which the instalment relates; or
  - (ii) that time occurs after the end of the instalment period to which the instalment relates, but the person has not paid the instalment by that time.

## **29 Subsection 601AH(3)**

Repeal the subsection, substitute:

(3) If:

- (a) ASIC reinstates the registration of a company under subsection (1); or
- (b) the Court makes an order under subsection (2);  
the Court may:
  - (c) validate anything done during the period:
    - (i) beginning when the company was deregistered; and
    - (ii) ending when the company's registration was reinstated; and
  - (d) make any other order it considers appropriate.

Note: For example, the Court may direct ASIC to transfer to another person property vested in ASIC under subsection 601AD(2).

## **Schedule 2—Application of amendments**

### ***Corporations Act 2001***

#### **1 At the end of Chapter 10**

Add:

### **Part 10.19—Transitional provisions relating to the Corporations Amendment (Phoenixing and Other Measures) Act 2012**

#### **1532 Definition**

In this Part:

***amending Act*** means the *Corporations Amendment (Phoenixing and Other Measures) Act 2012*.

#### **1533 Part 1 of Schedule 1 to the amending Act (winding up by ASIC)**

- (1) Paragraph 489EA(1)(a) of the *Corporations Act 2001* as amended by the amending Act applies in relation to a return of particulars given to a company before, at or after the commencement of Schedule 1 to the amending Act.
- (2) Subsection 489EA(2) of the *Corporations Act 2001* as amended by the amending Act applies in relation to a review fee, if the due date for payment occurs before, on or after the day on which Schedule 1 to the amending Act commences.
- (3) Subsection 489EA(3) of the *Corporations Act 2001* as amended by the amending Act applies in relation to a reinstatement that occurs before, at or after the commencement of Schedule 1 to the amending Act.

**1534 Part 2 of Schedule 1 to the amending Act (publication requirements)**

- (1) The amendment of subsection 412(1) of the *Corporations Act 2001* made by Part 3 of Schedule 1 to the amending Act applies in relation to a notice published after the commencement of Schedule 1 to the amending Act.
- (2) The amendment of subsection 436E(3) of the *Corporations Act 2001* made by Part 3 of Schedule 1 to the amending Act applies in relation to a meeting convened after the commencement of Schedule 1 to the amending Act.
- (3) The amendment of subsection 439A(3) of the *Corporations Act 2001* made by Part 3 of Schedule 1 to the amending Act applies in relation to a meeting convened after the commencement of Schedule 1 to the amending Act.
- (4) The amendment of subsection 446A(5) of the *Corporations Act 2001* made by Part 3 of Schedule 1 to the amending Act applies in relation to a resolution that is taken, because of section 446A of the *Corporations Act 2001*, to have been passed by a company after the commencement of Schedule 1 to the amending Act.
- (5) The amendment of subsection 449C(5) of the *Corporations Act 2001* made by Part 3 of Schedule 1 to the amending Act applies in relation to a meeting convened after the commencement of Schedule 1 to the amending Act.
- (6) The amendment of subsection 450A(1) of the *Corporations Act 2001* made by the amending Act applies in relation to an appointment of an administrator that occurs after the commencement of Schedule 1 to the amending Act.
- (7) The amendment of section 465A of the *Corporations Act 2001* made by Part 3 of Schedule 1 to the amending Act applies in relation to an application made under section 459P, 462 or 464 of that Act after the commencement of Schedule 1 to the amending Act.
- (8) The amendment of subsection 491(2) of the *Corporations Act 2001* made by Part 3 of Schedule 1 to the amending Act applies in relation to a resolution passed after the commencement of Schedule 1 to the amending Act.

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- (9) The amendment of subsection 497(2) of the *Corporations Act 2001* made by Part 3 of Schedule 1 to the amending Act applies in relation to a meeting convened after the commencement of Schedule 1 to the amending Act.
- (10) The amendment of subsection 498(3) of the *Corporations Act 2001* made by Part 3 of Schedule 1 to the amending Act applies in relation to an adjournment that occurs after the commencement of Schedule 1 to the amending Act.
- (11) The amendment of subsection 509(2) of the *Corporations Act 2001* made by Part 3 of Schedule 1 to the amending Act applies in relation to a meeting convened after the commencement of Schedule 1 to the amending Act.
- (12) The amendment of subsection 568A(2) of the *Corporations Act 2001* made by Part 3 of Schedule 1 to the amending Act applies in relation to a disclaimer of property, if the disclaimer occurs after the commencement of Schedule 1 to the amending Act.
- (13) Despite the amendments of sections 589, 601AA, 601AB and 1351 of the *Corporations Act 2001* made by Part 3 of Schedule 1 to the amending Act, if, before the commencement of Schedule 1 to the amending Act, ASIC gave notice of the proposed deregistration of a company in accordance with subsection 601AA(4) or 601AB(3) of the *Corporations Act 2001*, that Act continues to apply, in relation to the deregistration of the company, as if those amendments had not been made.

### **1535 Part 3 of Schedule 1 to the amending Act (miscellaneous amendments)**

Section 600AA of the *Corporations Act 2001* as amended by the amending Act applies in relation to an appointment, if the appointment occurs after the commencement of Schedule 1 to the amending Act.

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*[Minister's second reading speech made in—  
House of Representatives on 15 February 2012  
Senate on 13 March 2012]*

(7/12)

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