





# **Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017**

**No. 112, 2017**

**An Act to amend the law relating to corporations,  
and for related purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation  
(<https://www.legislation.gov.au/>)



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# Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017

No. 112, 2017

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## An Act to amend the law relating to corporations, and for related purposes

[Assented to 18 September 2017]

The Parliament of Australia enacts:

### 1 Short title

This Act is the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017*.

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No. 112, 2017      *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act*      1  
2017

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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.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provisions</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.	18 September 2017
2. Schedule 1, Part 1	The day after this Act receives the Royal Assent.	19 September 2017
3. Schedule 1, Part 2	A single day to be fixed by Proclamation. However, if the provisions do not commence on or before the later of: (a) 30 June 2018; and (b) the last day of the period of 6 months beginning on the day this Act receives the Royal Assent; they commence on the day after that later day.	

Note: This table relates only to the provisions of this Act as originally enacted.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 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Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule

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concerned, and any other item in a Schedule to this Act has effect according to its terms.

## Schedule 1—Amendments

### Part 1—Safe harbour for insolvent trading

#### *Corporations Act 2001*

##### **1 After subsection 588E(8)**

Insert:

- (8A) If, for the purposes of another recovery proceeding in relation to the company, evidence has been adduced or pointed to that suggests a reasonable possibility of:
- (a) subsection 588GA(1) applying in relation to a person and a debt; or
  - (b) subsection 588WA(1) applying in relation to a corporation and a debt;
- it must be presumed that that reasonable possibility exists.

##### **2 After section 588G**

Insert:

#### **588GA Safe harbour—taking course of action reasonably likely to lead to a better outcome for the company**

##### *Safe harbour*

- (1) Subsection 588G(2) does not apply in relation to a person and a debt if:
- (a) at a particular time after the person starts to suspect the company may become or be insolvent, the person starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company; and
  - (b) the debt is incurred directly or indirectly in connection with any such course of action during the period starting at that time, and ending at the earliest of any of the following times:
    - (i) if the person fails to take any such course of action within a reasonable period after that time—the end of that reasonable period;

- (ii) when the person ceases to take any such course of action;
- (iii) when any such course of action ceases to be reasonably likely to lead to a better outcome for the company;
- (iv) the appointment of an administrator, or liquidator, of the company.

Note 1: The person bears an evidential burden in relation to the matter in this subsection (see subsection (3)).

Note 2: For subsection (1) to be available, certain matters must be being done or be done (see subsections (4) and (5)).

*Working out whether a course of action is reasonably likely to lead to a better outcome*

- (2) For the purposes of (but without limiting) subsection (1), in working out whether a course of action is reasonably likely to lead to a better outcome for the company, regard may be had to whether the person:
  - (a) is properly informing himself or herself of the company's financial position; or
  - (b) is taking appropriate steps to prevent any misconduct by officers or employees of the company that could adversely affect the company's ability to pay all its debts; or
  - (c) is taking appropriate steps to ensure that the company is keeping appropriate financial records consistent with the size and nature of the company; or
  - (d) is obtaining advice from an appropriately qualified entity who was given sufficient information to give appropriate advice; or
  - (e) is developing or implementing a plan for restructuring the company to improve its financial position.
- (3) A person who wishes to rely on subsection (1) in a proceeding for, or relating to, a contravention of subsection 588G(2) bears an evidential burden in relation to that matter.

*Matters that must be being done or be done*

- (4) Subsection (1) does not apply in relation to a person and a debt if:

**Schedule 1** Amendments

**Part 1** Safe harbour for insolvent trading

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(a) when the debt is incurred, the company is failing to do one or more of the following matters:

- (i) pay the entitlements of its employees by the time they fall due;
- (ii) give returns, notices, statements, applications or other documents as required by taxation laws (within the meaning of the *Income Tax Assessment Act 1997*); and

(b) that failure:

- (i) amounts to less than substantial compliance with the matter concerned; or
- (ii) is one of 2 or more failures by the company to do any or all of those matters during the 12 month period ending when the debt is incurred;

unless an order applying to the person and that failure is in force under subsection (6).

Note: Employee *entitlements* are defined in subsection 596AA(2) and include superannuation contributions payable by the company.

(5) Subsection (1) is taken never to have applied in relation to a person and a debt if:

- (a) after the debt is incurred, the person fails to comply with paragraph 429(2)(b), or subsection 475(1), 497(4) or 530A(1), in relation to the company; and
- (b) that failure amounts to less than substantial compliance with the provision concerned;

unless an order applying to the person and that failure is in force under subsection (6).

(6) The Court may order that subsection (4) or (5) does not apply to a person and one or more failures if:

- (a) the Court is satisfied that the failures were due to exceptional circumstances or that it is otherwise in the interests of justice to make the order; and
- (b) an application for the order is made by the person.

*Definitions*

(7) In this section:

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***better outcome***, for the company, means an outcome that is better for the company than the immediate appointment of an administrator, or liquidator, of the company.

***evidential burden***, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

**588GB Information or books not admissible to support the safe harbour if failure to permit inspection etc.**

*When books or information not admissible for the safe harbour*

- (1) If, at a particular time:
- (a) a person fails to permit the inspection of, or deliver, any books of the company in accordance with:
    - (i) a notice given to the person under subsection 438C(3), section 477 or subsection 530B(4); or
    - (ii) an order made under section 486; or
    - (iii) subsection 438B(1), 477(3) or 530A(1); or
  - (b) a warrant is issued under subsection 530C(2) because the Court is satisfied that a person has concealed, destroyed or removed books of the company or is about to do so;

those books, and any secondary evidence of those books, are not admissible in evidence for the person in a relevant proceeding.

Note: For subparagraph (a)(i), a liquidator could give such a notice if this is necessary for winding up the affairs of the company and distributing its property (see paragraph 477(2)(m)).

- (2) If, at a particular time, a person fails to give any information about the company in accordance with:
- (a) a notice given to the person under section 477; or
  - (b) paragraph 429(2)(b) or (c) or subsection 438B(2) or (3), 475(1), 497(4) or 530A(1) or (2);
- that information is not admissible in evidence for the person in a relevant proceeding.

*Exceptions*

- (3) However, subsection (1) or (2) does not apply to a person, and a book or information, if:
- (a) the person proves that:
    - (i) the person did not possess the book or information at any time referred to in that subsection; and
    - (ii) there were no reasonable steps the person could have taken to obtain the book or information; or
  - (b) each entity seeking to rely on the notice, order, subsection, paragraph or warrant referred to in that subsection fails to comply with subsection (5) in relation to the person; or
  - (c) an order applying to the person, and the book or information, is in force under subsection (4).
- (4) The Court may order that subsection (1) or (2) does not apply to a person, and a book or information, if:
- (a) the Court is satisfied that the failures by the person as mentioned in that subsection were due to exceptional circumstances or that it is otherwise in the interests of justice to make the order; and
  - (b) an application for the order is made by the person.

*Notice of effect of this section must be given*

- (5) An entity that seeks to rely on a notice, order, subsection or warrant referred to in subsection (1) or (2) must set out the effect of this section:
- (a) for a notice under subsection 438C(3), section 477 or subsection 530B(4)—in that notice; or
  - (b) for an order under section 486 or for subsection 438B(3), 477(3) or 530A(2)—in a written notice given to the person when the entity seeks to rely on that order or subsection; or
  - (c) for a warrant issued under subsection 530C(2)—in a written notice given to the person when the entity seeks to exercise the warrant.

This subsection does not apply to an entity that seeks to rely on paragraph 429(2)(b) or (c) or subsection 438B(1) or (2), 475(1), 497(4) or 530A(1).

- (6) A failure to comply with subsection (5) does not affect the validity of the notice, order, subsection or warrant referred to in subsection (5).

*Definitions*

- (7) In this section:

***relevant proceeding*** means a proceeding:

- (a) for, or relating to, a contravention of subsection 588G(2); and
- (b) in which a person seeks to rely on subsection 588GA(1).

Example: A proceeding under section 588M.

### **3 Section 588H (heading)**

Repeal the heading, substitute:

#### **588H Defences about reasonable grounds, illness or reasonable steps**

#### **3A At the end of Division 3 of Part 5.7B**

Add:

#### **588HA Review relating to safe harbour**

- (1) The Minister must cause an independent review of the following matters to be undertaken as soon as practicable after the last day of the 2 year period commencing on the commencement of this section:
  - (a) the impact of the availability of the safe harbour to directors of companies on:
    - (i) the conduct of directors; and
    - (ii) the interests of creditors and employees of those companies;
  - (b) any other matters the Minister considers relevant.
- (2) The review must be undertaken by 3 persons who, in the Minister's opinion, possess appropriate qualifications to undertake the review.
- (3) The persons who undertake the review must give the Minister a written report of the review.

(4) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the day on which the report is given to the Minister.

(5) The report is not a legislative instrument.

#### **4 After section 588W**

Insert:

##### **588WA Safe harbour—taking reasonable steps to ensure company’s directors have the benefit of the directors’ safe harbour**

(1) Subsection 588V(1) does not apply in relation to a corporation that is the holding company of a company, and to a debt, if:

(a) the corporation takes reasonable steps to ensure that subsection 588GA(1) (about a safe harbour for directors taking certain courses of action) applies in relation to:

- (i) each of the directors of the company; and
- (ii) the debt; and

(b) subsection 588GA(1) does so apply in relation to each of those directors and to the debt.

(2) A corporation that wishes to rely on subsection (1) in a proceeding for, or relating to, a contravention of subsection 588V(1) bears an evidential burden in relation to that matter.

(3) In this section:

*evidential burden*, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

#### **5 Section 588X (heading)**

Repeal the heading, substitute:

##### **588X Defences about reasonable grounds, illness or reasonable steps**

#### **6 Application of amendments**

The amendments made by this Part apply in relation to:

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- (a) courses of action developed or taken before, at or after the commencement of this Part; and
- (b) debts incurred at or after that commencement.

## **Part 2—Stay on enforcing rights merely because of arrangements or restructures**

### *Corporations Act 2001*

#### **7 At the end of Part 5.1**

Add:

#### **415D Stay on enforcing rights merely because of a proceeding under this Part etc.**

##### *Stay on enforcing rights*

- (1) A right cannot be enforced against a body for:
- (a) the reason that the body, if it is a disclosing entity, has publicly announced that it will be making an application under section 411 for the purpose of avoiding being wound up in insolvency; or
  - (b) the reason that the body is the subject of an application under section 411; or
  - (c) the reason that the body is the subject of a compromise or arrangement approved under this Part as a result of an application under section 411; or
  - (d) the body's financial position, if the body is the subject of such an announcement, application, compromise or arrangement; or
  - (e) a reason, prescribed by the regulations for the purposes of this paragraph, that relates to:
    - (i) the making, or possible making, of such an announcement, application, compromise or arrangement about the body; or
    - (ii) the body's financial position;  
if such an announcement, application, compromise or arrangement is later made about the body; or
  - (f) a reason that, in substance, is contrary to this subsection; if the right arises for that reason by express provision (however described) of a contract, agreement or arrangement.

Note: This result is subject to subsections (5), (6) and (8), and to any order under section 415E.

Example: A right to terminate a contract will not be enforceable to the extent that those rights are triggered by the body becoming the subject of such an announcement, application, compromise or arrangement.

*Period of the stay*

- (2) The right cannot be enforced as described in subsection (1) during the period (the *stay period*) that:
- (a) starts:
    - (i) if the body makes an announcement referred to in paragraph (1)(a)—when the announcement is made; or
    - (ii) otherwise—when the application under section 411 is made; and
  - (b) ends:
    - (i) if the body makes an announcement referred to in paragraph (1)(a), and fails to make the announced application within the next 3 months or within any period ordered under subsection (3) for the body—at the end of the longer of those periods; or
    - (ii) when the application under section 411 is withdrawn or when the Court dismisses the application; or
    - (iii) unless subparagraph (iv) applies—at the end of any compromise or arrangement approved under this Part as a result of the application under section 411; or
    - (iv) if such a compromise or arrangement ends because of a resolution or order for the body to be wound up—when the body’s affairs have been fully wound up.
- (3) The Court may order a longer period than the 3 months otherwise applying under subparagraph (2)(b)(i) for the body if the Court is satisfied that the longer period is appropriate having regard to the interests of justice.

*Enforcing rights after the stay for reasons relating to earlier circumstances*

- (4) The right is unenforceable against the body indefinitely after the end of the stay period to the extent that a reason for seeking to enforce the right:
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**Schedule 1** Amendments

**Part 2** Stay on enforcing rights merely because of arrangements or restructures

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- (a) is the body's financial position before the end of the stay period; or
- (b) is the body having been the subject of any of the following before the end of the stay period:
  - (i) an announcement referred to in paragraph (1)(a);
  - (ii) an application under section 411;
  - (iii) a compromise or arrangement approved under this Part as a result of an application under section 411; or
- (c) is a reason, prescribed by the regulations for the purposes of this paragraph, relating to circumstances in existence during the stay period; or
- (d) is a reason referred to in paragraph (1)(e) or (f).

*Application must be made to avoid insolvency*

- (5) However, subsection (1) does not apply, and is taken never to have applied, if the application under section 411 fails to state that it is being made for the purpose of the body avoiding being wound up in insolvency.

*Rights not subject to the stay*

- (6) Subsection (1) does not apply to the right if it is:
  - (a) a right under a contract, agreement or arrangement entered into after the day the order (if any) approving under this Part a compromise or arrangement as a result of the application takes effect; or
  - (b) a right contained in a kind of contract, agreement or arrangement:
    - (i) prescribed by the regulations for the purposes of this subparagraph; or
    - (ii) declared under paragraph (7)(a); or
  - (c) a right of a kind declared under paragraph (7)(b); or
  - (d) a right of a kind declared under paragraph (7)(c), and the circumstances specified in that declaration exist.

Note: For paragraph (a), subsection 411(10) sets out when the order takes effect.

- (7) For the purposes of subsection (6), the Minister may, by legislative instrument:
- (a) declare kinds of contracts, agreements or arrangements referred to in a specified law of the Commonwealth; or
  - (b) declare kinds of rights to which subsection (1) does not apply; or
  - (c) declare kinds of rights to which subsection (1) does not apply in specified circumstances.
- (8) If the application under section 411 results in the approval under this Part of a compromise or arrangement, subsection (1) does not apply to the right to the extent that:
- (a) the person appointed to administer the compromise or arrangement; or
  - (b) if a liquidator of the body is appointed after the start of the stay period—the liquidator;
- has consented in writing to the enforcement of the right.

*Stay on body's right to new advance of money or credit*

- (9) If:
- (a) one or more rights of an entity cannot be enforced against a body for a period because of subsection (1); and
  - (b) the body has a right under a contract, agreement or arrangement against the entity for a new advance of money or credit;
- that right of the body cannot be enforced during the same period.

#### **415E Lifting the stay**

- (1) The Court may order that subsection 415D(1) does not apply for one or more rights against a body if the Court is satisfied:
- (a) that the relevant compromise or arrangement:
    - (i) to be applied for; or
    - (ii) applied for; or
    - (iii) approved;under this Part is not for the purpose of the body avoiding being wound up in insolvency; or
  - (b) that this is appropriate in the interests of justice.

- (2) The order may also provide that the holder of those rights may choose to enforce those rights from the earlier of:
  - (a) the day any announcement referred to in paragraph 415D(1)(a) was made by the body; and
  - (b) the day any application under section 411 was made for the compromise or arrangement.
- (3) An application for the order may be made by the holder of those rights.

#### 415F Order for rights to be enforceable only with leave of the Court

##### *Orders*

- (1) The Court may order that one or more rights under a contract, agreement or arrangement are enforceable against a body only:
  - (a) with the leave of the Court; and
  - (b) in accordance with such terms (if any) as the Court imposes.

Example: The order could be sought for a right to terminate for convenience.

- (2) The Court may make the order (the *stay order*) if:
  - (a) the body is the subject of any of the following:
    - (i) an announcement referred to in paragraph 415D(1)(a);
    - (ii) an application under section 411 (the *section 411 application*);
    - (iii) a compromise or arrangement approved under this Part as a result of a section 411 application; and
  - (b) the Court is satisfied that:
    - (i) the rights are being exercised; or
    - (ii) the rights are likely to be exercised; or
    - (iii) there is a threat to exercise the rights; because of one or more reasons referred to in paragraphs 415D(1)(a) to (f); and
  - (c) an application for the stay order is:
    - (i) if the body has made an announcement referred to in paragraph 415D(1)(a), but not yet a section 411 application—made by the body; or

- (ii) if the body has made a section 411 application, but a resulting compromise or arrangement is yet to be approved under this Part—included in the section 411 application; or
  - (iii) if a compromise or arrangement has been approved under this Part as a result of the section 411 application—made by the person appointed to administer the compromise or arrangement; and
  - (d) in a case where the body has made a section 411 application—the section 411 application states it is being made for the purpose of the body avoiding being wound up in insolvency.
- (3) A stay order must specify the period for which it applies. In working out the period, the Court must have regard to:
- (a) subsections 415D(2), (3) and (4); and
  - (b) the interests of justice.
- (4) Subsection (1) does not apply to a right referred to in subsection 415D(6) or (8).

*Interim orders*

- (5) Before deciding an application for a stay order, the Court may grant an interim order for one or more rights under a contract, agreement or arrangement not to be enforced against a body.
- (6) The Court must not require an applicant for a stay order to give an undertaking as to damages as a condition of granting an interim order.

**415FA Self-executing provisions**

- (1) The object of subsection (2) is to ensure that a self-executing provision:
- (a) cannot start to apply against a body for certain reasons; and
  - (b) can be the subject of a Court order providing that the provision can only start to apply against a body with the leave of the Court, and in accordance with such terms (if any) as the Court imposes.

## Schedule 1 Amendments

### Part 2 Stay on enforcing rights merely because of arrangements or restructures

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- (2) Sections 415D to 415F also apply in relation to a self-executing provision in a corresponding way to the way they apply in relation to a right. For this purpose, assume those sections apply with such modifications as are necessary, including any prescribed by the regulations for the purposes of this subsection.

Note 1: This subsection achieves the object in subsection (1) by extending the application of all of the outcomes, exceptions and powers in sections 415D to 415F.

Note 2: These modifications include, for example, treating:

- (a) a reference that a right cannot be enforced (however described) as including a reference that a self-executing provision cannot start to apply; and
- (b) the words “if the right arises for that reason by express provision (however described) of a contract, agreement or arrangement” as being omitted from subsection 415D(1); and
- (c) a reference that one or more rights are enforceable as including a reference that one or more self-executing provisions can start to apply; and
- (d) paragraph 415F(2)(b) as alternatively providing that the Court is satisfied that one or more reasons referred to in paragraphs 415D(1)(a) to (f) can cause the self-executing provisions to start to apply.

- (3) In this section:

***self-executing provision*** means a provision of a contract, agreement or arrangement that can start to apply automatically:

- (a) for one or more reasons; and
- (b) without any party to the contract, agreement or arrangement making a decision that the provision should start to apply.

### 415G When other laws prevail—certain other Commonwealth Acts

If there is any inconsistency between sections 415D to 415FA and one of the following Acts, that Act prevails to the extent of the inconsistency:

- (a) the *Payment Systems and Netting Act 1998*;
- (b) the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013*.

## 8 At the end of Part 5.2

Add:

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**434J Stay on enforcing rights merely because of the appointment of a managing controller of a corporation's property etc.**

*Stay on enforcing rights*

- (1) A right cannot be enforced against a corporation for:
- (a) the reason of the appointment or existence of a managing controller of the whole or substantially the whole of the corporation's property; or
  - (b) the corporation's financial position, if there is a managing controller of the whole or substantially the whole of the corporation's property; or
  - (c) a reason, prescribed by the regulations for the purposes of this paragraph, that relates to:
    - (i) the appointing, or possible appointing, of a managing controller of the whole or substantially the whole of the corporation's property; or
    - (ii) the corporation's financial position;if such an appointment is later made for the whole or substantially the whole of the corporation's property; or
  - (d) a reason that, in substance, is contrary to this subsection; if the right arises for that reason by express provision (however described) of a contract, agreement or arrangement.

Note: This result is subject to subsections (5) and (7), and to any order under section 434K.

Example: A right to terminate a contract will not be enforceable to the extent that those rights are triggered by the appointment of a managing controller.

*Period of the stay*

- (2) The right cannot be enforced as described in subsection (1) during the period (the *stay period*) starting at the appointment of the managing controller and ending:
- (a) unless paragraph (b) applies—when the managing controller's control of the corporation's property ends; or
  - (b) if one or more orders are made under subsection (3) for the corporation as the result of an application made before the end of the managing controller's control of the corporation's

property—when the last made of those orders ceases to be in force.

- (3) The Court:
- (a) may order an extension of the period otherwise applying under subsection (2) for the corporation if the Court is satisfied that the extension is appropriate having regard to the interests of justice; and
  - (b) before deciding an application for an order under paragraph (a), may grant an interim order, but must not require the applicant to give an undertaking as to damages as a condition for doing so.

*Enforcing rights after the stay for reasons relating to earlier circumstances*

- (4) The right is unenforceable against the corporation indefinitely after the end of the stay period to the extent that a reason for seeking to enforce the right:
- (a) is the corporation's financial position before the end of the stay period; or
  - (b) is the appointment or existence of a managing controller of the whole or substantially the whole of the corporation's property before the end of the stay period; or
  - (c) is a reason, prescribed by the regulations for the purposes of this paragraph, relating to circumstances in existence during the stay period; or
  - (d) is a reason referred to in paragraph (1)(c) or (d).

*Rights not subject to the stay*

- (5) Subsection (1) does not apply to the right if it is:
- (a) a right under a contract, agreement or arrangement entered into after the appointment of the managing controller; or
  - (b) a right contained in a kind of contract, agreement or arrangement:
    - (i) prescribed by the regulations for the purposes of this subparagraph; or
    - (ii) declared under paragraph (6)(a); or
  - (c) a right of a kind declared under paragraph (6)(b); or

- (d) a right of a kind declared under paragraph (6)(c), and the circumstances specified in that declaration exist.
- (6) For the purposes of subsection (5), the Minister may, by legislative instrument:
  - (a) declare kinds of contracts, agreements or arrangements referred to in a specified law of the Commonwealth; or
  - (b) declare kinds of rights to which subsection (1) does not apply; or
  - (c) declare kinds of rights to which subsection (1) does not apply in specified circumstances.
- (7) Subsection (1) does not apply to the right to the extent that the managing controller has consented in writing to the enforcement of the right.

*Stay on corporation's right to new advance of money or credit*

- (8) If:
  - (a) one or more rights of an entity cannot be enforced against a corporation for a period because of subsection (1); and
  - (b) the corporation has a right under a contract, agreement or arrangement against the entity for a new advance of money or credit;that right of the corporation cannot be enforced during the same period.

*Replacement managing controllers*

- (9) If a new managing controller of the whole or substantially the whole of the corporation's property is appointed to replace an earlier such managing controller, then:
  - (a) for the purposes of subsections (2) and (5), treat the new managing controller as if it were appointed when the first such managing controller was; and
  - (b) treat references in subsection (2) to when the managing controller's control of the corporation's property ends as references to when the last such managing controller's control of the corporation's property ends.

### **434K Lifting the stay**

- (1) The Court may order that subsection 434J(1) does not apply for one or more rights against a corporation if the Court is satisfied that this is appropriate in the interests of justice.
- (2) An application for the order may be made by the holder of those rights.

### **434L Order for rights to be enforceable only with leave of the Court**

#### *Orders*

- (1) The Court may order that one or more rights under a contract, agreement or arrangement are enforceable against a corporation only:
    - (a) with the leave of the Court; and
    - (b) in accordance with such terms (if any) as the Court imposes.

Example: The order could be sought for a right to terminate for convenience.
  - (2) The Court may make the order if:
    - (a) there is a managing controller of the whole or substantially the whole of the corporation's property; and
    - (b) the Court is satisfied that:
      - (i) the rights are being exercised; or
      - (ii) the rights are likely to be exercised; or
      - (iii) there is a threat to exercise the rights; because of one or more reasons referred to in paragraphs 434J(1)(a) to (d); and
    - (c) an application for the order is made by the managing controller.
  - (3) An order under subsection (1) must specify the period for which it applies. In working out the period, the Court must have regard to:
    - (a) subsections 434J(2), (3) and (4); and
    - (b) the interests of justice.
  - (4) Subsection (1) does not apply to a right referred to in subsection 434J(5) or (7).
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*Interim orders*

- (5) Before deciding an application for an order under subsection (1), the Court may grant an interim order for one or more rights under a contract, agreement or arrangement not to be enforced against a corporation.
- (6) The Court must not require an applicant for an order under subsection (1) to give an undertaking as to damages as a condition of granting an interim order.

**434LA Self-executing provisions**

- (1) The object of subsection (2) is to ensure that a self-executing provision:
  - (a) cannot start to apply against a corporation for certain reasons; and
  - (b) can be the subject of a Court order providing that the provision can only start to apply against a corporation with the leave of the Court, and in accordance with such terms (if any) as the Court imposes.
- (2) Sections 434J to 434L also apply in relation to a self-executing provision in a corresponding way to the way they apply in relation to a right. For this purpose, assume those sections apply with such modifications as are necessary, including any prescribed by the regulations for the purposes of this subsection.

Note 1: This subsection achieves the object in subsection (1) by extending the application of all of the outcomes, exceptions and powers in sections 434J to 434L.

Note 2: These modifications include, for example, treating:

- (a) a reference that a right cannot be enforced (however described) as including a reference that a self-executing provision cannot start to apply; and
- (b) the words “if the right arises for that reason by express provision (however described) of a contract, agreement or arrangement” as being omitted from subsection 434J(1); and
- (c) a reference that one or more rights are enforceable as including a reference that one or more self-executing provisions can start to apply; and
- (d) paragraph 434L(2)(b) as alternatively providing that the Court is satisfied that one or more reasons referred to in paragraphs

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434J(1)(a) to (d) can cause the self-executing provisions to start to apply.

(3) In this section:

***self-executing provision*** means a provision of a contract, agreement or arrangement that can start to apply automatically:

- (a) for one or more reasons; and
- (b) without any party to the contract, agreement or arrangement making a decision that the provision should start to apply.

#### **434M When other laws prevail—certain other Commonwealth Acts**

If there is any inconsistency between sections 434J to 434LA and one of the following Acts, that Act prevails to the extent of the inconsistency:

- (a) the *Payment Systems and Netting Act 1998*;
- (b) the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013*.

#### **9 Subsection 441A(3)**

Omit “or 440G”, substitute “, 440G or 451E”.

#### **10 Subsection 441A(3)**

After “444F(2)”, insert “or 451G(1)”.

#### **11 Subsection 441B(2)**

Omit “or 440G”, substitute “, 440G or 451E, or in an order under subsection 451G(1),”.

#### **12 Subsection 441C(2)**

Omit “or 440B”, substitute “, 440B or 451E, or in an order under subsection 451G(1),”.

#### **13 Section 441E**

Omit “or 440B”, substitute “, 440B or 451E, or in an order under subsection 451G(1),”.

## **14 At the end of Division 17 of Part 5.3A**

Add:

### **451E Stay on enforcing rights merely because the company is under administration etc.**

#### *Stay on enforcing rights*

- (1) A right cannot be enforced against a company for:
- (a) the reason that the company has come or is under administration; or
  - (b) the company's financial position, if the company is under administration; or
  - (c) a reason, prescribed by the regulations for the purposes of this paragraph, that relates to:
    - (i) the company coming, or possibly coming, under administration; or
    - (ii) the company's financial position;  
if the company later comes under administration; or
  - (d) a reason that, in substance, is contrary to this subsection; if the right arises for that reason by express provision (however described) of a contract, agreement or arrangement.

Note: This result is subject to subsections (5) and (7), and to any order under section 451F.

Example: A right to terminate a contract will not be enforceable to the extent that those rights are triggered by the company coming under administration.

#### *Period of the stay*

- (2) The right cannot be enforced as described in subsection (1) during the period (the ***stay period***) starting when the company comes under administration and ending at the latest of the following:
- (a) when the administration ends;
  - (b) if one or more orders are made under subsection (3) for the company as the result of an application made before the administration ends—when the last made of those orders ceases to be in force;

(c) if the administration ends because of a resolution or order for the company to be wound up—when the company’s affairs have been fully wound up.

(3) The Court:

- (a) may order an extension of the period otherwise applying under subsection (2) for the company if the Court is satisfied that the extension is appropriate having regard to the interests of justice; and
- (b) before deciding an application for an order under paragraph (a), may grant an interim order, but must not require the applicant to give an undertaking as to damages as a condition for doing so.

*Enforcing rights after the stay for reasons relating to earlier circumstances*

(4) The right is unenforceable against the company indefinitely after the end of the stay period to the extent that a reason for seeking to enforce the right:

- (a) is the company’s financial position before the end of the stay period; or
- (b) is the company having come or been under administration before the end of the stay period; or
- (c) is a reason, prescribed by the regulations for the purposes of this paragraph, relating to circumstances in existence during the stay period; or
- (d) is a reason referred to in paragraph (1)(c) or (d).

*Rights not subject to the stay*

(5) Subsection (1) does not apply to the right if it is:

- (a) a right under a contract, agreement or arrangement entered into after the company comes under administration; or
- (b) a right contained in a kind of contract, agreement or arrangement:
  - (i) prescribed by the regulations for the purposes of this subparagraph; or
  - (ii) declared under paragraph (6)(a); or
- (c) a right of a kind declared under paragraph (6)(b); or

- (d) a right of a kind declared under paragraph (6)(c), and the circumstances specified in that declaration exist.

Note: Subsection (1) also does not apply to certain secured creditors (see Subdivision B of Division 7).

- (6) For the purposes of subsection (5), the Minister may, by legislative instrument:
- (a) declare kinds of contracts, agreements or arrangements referred to in a specified law of the Commonwealth; or
  - (b) declare kinds of rights to which subsection (1) does not apply; or
  - (c) declare kinds of rights to which subsection (1) does not apply in specified circumstances.
- (7) Subsection (1) does not apply to the right to the extent that:
- (a) the administrator of the company; or
  - (b) if a liquidator of the company is appointed after the administration ends—the liquidator;
- has consented in writing to the enforcement of the right.

*Stay on company's right to new advance of money or credit*

- (8) If:
- (a) one or more rights of an entity cannot be enforced against a company for a period because of subsection (1); and
  - (b) the company has a right under a contract, agreement or arrangement against the entity for a new advance of money or credit;
- that right of the company cannot be enforced during the same period.

#### **451F Lifting the stay**

- (1) The Court may order that subsection 451E(1) does not apply for one or more rights against a company if the Court is satisfied that this is appropriate in the interests of justice.
- (2) An application for the order may be made by the holder of those rights.

## 451G Order for rights to be enforceable only with leave of the Court

### *Orders*

- (1) The Court may order that one or more rights under a contract, agreement or arrangement are enforceable against a company only:
- (a) with the leave of the Court; and
  - (b) in accordance with such terms (if any) as the Court imposes.

Example: The order could be sought for a right to terminate for convenience.

- (2) The Court may make the order if:
- (a) the company is under administration; and
  - (b) the Court is satisfied that:
    - (i) the rights are being exercised; or
    - (ii) the rights are likely to be exercised; or
    - (iii) there is a threat to exercise the rights; because of one or more reasons referred to in paragraphs 451E(1)(a) to (d); and
  - (c) an application for the order is made by the administrator of the company.
- (3) An order under subsection (1) must specify the period for which it applies. In working out the period, the Court must have regard to:
- (a) subsections 451E(2), (3) and (4); and
  - (b) the interests of justice.
- (4) Subsection (1) does not apply to a right referred to in subsection 451E(5) or (7).

Note: An order under subsection (1) also does not restrict certain secured creditors (see Subdivision B of Division 7).

### *Interim orders*

- (5) Before deciding an application for an order under subsection (1), the Court may grant an interim order for one or more rights under a contract, agreement or arrangement not to be enforced against a company.
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- (6) The Court must not require an applicant for an order under subsection (1) to give an undertaking as to damages as a condition of granting an interim order.

#### **451GA Self-executing provisions**

- (1) The object of subsection (2) is to ensure that a self-executing provision:
- (a) cannot start to apply against a company for certain reasons; and
  - (b) can be the subject of a Court order providing that the provision can only start to apply against a company with the leave of the Court, and in accordance with such terms (if any) as the Court imposes.
- (2) Sections 451E to 451G also apply in relation to a self-executing provision in a corresponding way to the way they apply in relation to a right. For this purpose, assume those sections apply with such modifications as are necessary, including any prescribed by the regulations for the purposes of this subsection.

Note 1: This subsection achieves the object in subsection (1) by extending the application of all of the outcomes, exceptions and powers in sections 451E to 451G.

Note 2: These modifications include, for example, treating:

- (a) a reference that a right cannot be enforced (however described) as including a reference that a self-executing provision cannot start to apply; and
- (b) the words “if the right arises for that reason by express provision (however described) of a contract, agreement or arrangement” as being omitted from subsection 451E(1); and
- (c) a reference that one or more rights are enforceable as including a reference that one or more self-executing provisions can start to apply; and
- (d) paragraph 451G(2)(b) as alternatively providing that the Court is satisfied that one or more reasons referred to in paragraphs 451E(1)(a) to (d) can cause the self-executing provisions to start to apply.

- (3) In this section:

***self-executing provision*** means a provision of a contract, agreement or arrangement that can start to apply automatically:

- (a) for one or more reasons; and

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- (b) without any party to the contract, agreement or arrangement making a decision that the provision should start to apply.

**451H When other laws prevail—certain other Commonwealth Acts**

If there is any inconsistency between sections 451E to 451GA and one of the following Acts, that Act prevails to the extent of the inconsistency:

- (a) the *Payment Systems and Netting Act 1998*;  
(b) the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013*.

***Payment Systems and Netting Act 1998***

**15 Section 5 (paragraph (d) of the definition of *specified provisions*)**

Before “437D”, insert “415D to 415FA, 434J to 434LA,”.

**16 Section 5 (paragraph (d) of the definition of *specified provisions*)**

After “440B,”, insert “451E to 451GA,”.

**17 Application of amendments**

The amendments made by this Part apply in relation to rights arising under, or self-executing provisions of, contracts, agreements or arrangements entered into at or after the commencement of this Part.

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[*Minister’s second reading speech made in—  
House of Representatives on 1 June 2017  
Senate on 22 June 2017*]

(102/17)

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