Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020

No. 6, 2020

An Act to amend the law relating to corporations and taxation, 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 (Combating Illegal Phoenixing) Act 2020

No. 6, 2020

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

[*Assented to 17 February 2020*]

The Parliament of Australia enacts:

1 Short title

This Act is the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020.*

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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.

Commencement information		
Column 1	**Column 2**	**Column 3**
Provisions	**Commencement**	**Date/Details**
1. Sections 1 to 4 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	17 February 2020
2. Schedules 1 and 2	The day after this Act receives the Royal Assent.	18 February 2020
3. Schedules 3 and 4	The first 1 January, 1 April, 1 July or 1 October to occur after the day this Act receives the Royal Assent.	1 April 2020

Note: This table relates only to the provisions of this Act as originally enacted.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Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

4 Review of operation of amendments

(1) The Minister must cause an independent review to be conducted of the operation of the amendments made by Schedules 1, 3 and 4 to this Act.

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(2) The review must start as soon as practicable after the end of 5 years after this Act receives the Royal Assent.

(3) The persons who conduct 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 report is given to the Minister.

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Schedule 1—Phoenixing offences and other rules about property transfers to defeat creditors

Part 1—Main amendments of the Corporations Act 2001

Corporations Act 2001

1 Section 9

Insert:

> ***creditor-defeating disposition*** has the meaning given by section 588FDB.

2 Subsection 111Q(1)

Omit "Paragraph 588E(4)(a)", substitute "Paragraphs 588E(4)(a) and (4A)(a)".

3 Subsection 111Q(2)

Omit "Paragraph 588E(4)(b)", substitute "Paragraphs 588E(4)(b) and (4A)(b)".

4 Paragraph 415D(6)(c)

Repeal the paragraph, substitute:

(c) a right of a kind:
  (i) prescribed by the regulations for the purposes of this subparagraph; or
  (ii) declared under paragraph (7)(b); or

5 Paragraph 434J(5)(c)

Repeal the paragraph, substitute:

(c) a right of a kind:
  (i) prescribed by the regulations for the purposes of this subparagraph; or
  (ii) declared under paragraph (6)(b); or

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6 Paragraph 451E(5)(c)

Repeal the paragraph, substitute:

(c) a right of a kind:

(i) prescribed by the regulations for the purposes of this subparagraph; or

(ii) declared under paragraph (6)(b); or

7 Subsection 588E(1) (after paragraph (a) of the definition of *recovery proceeding*)

Insert:

(aa) action by ASIC under section 588FGAA; or

(ab) proceedings under section 588FGAE; or

8 Subsection 588E(1) (after paragraph (e) of the definition of *recovery proceeding*)

Insert:

(ea) proceedings for a contravention of subsection 588GAB(2) or 588GAC(2) in relation to a disposition of property of the company (including proceedings under section 588M in relation to the disposition but not including proceedings for an offence); or

9 After subsection 588E(4)

Insert:

(4A) In determining for the purposes of the recovery proceeding whether a disposition of property of the company is a creditor-defeating disposition, the consideration payable to the company for the disposition is to be presumed to be less than both the market value of the property and the best price reasonably obtainable for the property, if it is proved that the company:

(a) has failed to keep financial records relating to the disposition as required by subsection 286(1); or

(b) has failed to retain financial records relating to the disposition for 7 years after the disposition as required by subsection 286(2).

This subsection is subject to subsections (5) and (6).

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10 Subsection 588E(5)

Omit "Paragraph (4)(a) does", substitute "Paragraphs (4)(a) and (4A)(a) do".

11 Subsection 588E(6)

Omit "Subsection (4) does not have effect, in so far as it would prejudice a right or interest of a person for the company to be presumed insolvent because of a contravention of subsection 286(2)", substitute "A presumption under subsection (4) or (4A) of this section, applying because of a contravention of subsection 286(2), does not have effect so far as it would prejudice a right or interest of a person".

12 Paragraph 588E(8)(a)

After "subsection 588FG(2)", insert "or in subsection 588FG(9)".

13 After paragraph 588E(8)(a)

Insert:

(aa) if the other proceeding is of the kind referred to in paragraph (1)(ab) of this section—a matter of the kind referred to in a paragraph of subsection 588FG(2), 588GAB(2) or 588GAC(2), or a defence under subsection 588GAB(3) or 588GAC(3) or section 588H; or

14 Paragraph 588E(8)(b)

After "588FH(1)", insert "or in subsection 588FG(9)".

15 After paragraph 588E(8)(d)

Insert:

(da) if the other proceeding is of the kind referred to in paragraph (1)(ea) of this section—a matter of the kind referred to in a paragraph of subsection 588GAB(2) or 588GAC(2), or a defence under subsection 588GAB(3) or 588GAC(3) or section 588H; or

16 Paragraph 588E(8A)(a)

Omit "a debt", substitute "either a debt or a disposition".

17 Before section 588FA

Insert:

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Subdivision A—Kinds of transactions that may be voidable

18 After section 588FDA

Insert:

588FDB Creditor-defeating disposition

(1) A disposition of property of a company is a ***creditor-defeating disposition*** if:
  (a) the consideration payable to the company for the disposition was less than the lesser of the following at the time the relevant agreement (as defined in section 9) for the disposition was made or, if there was no such agreement, at the time of the disposition:
    (i) the market value of the property;
    (ii) the best price that was reasonably obtainable for the property, having regard to the circumstances existing at that time; and
  (b) the disposition has the effect of:
    (i) preventing the property from becoming available for the benefit of the company's creditors in the winding-up of the company; or
    (ii) hindering, or significantly delaying, the process of making the property available for the benefit of the company's creditors in the winding-up of the company.

Extensions of concept of disposition

(2) For the purposes of this section and provisions of this Act that refer to a creditor-defeating disposition, if a company does something that results in another person becoming the owner of property that did not previously exist, the company is taken to have made a disposition of the property.

(3) For the purposes of this section and provisions of this Act that refer to a creditor-defeating disposition, if:
  (a) a company makes a disposition of property to another person; and

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(b) the other person gives some or all of the consideration for the disposition to a person (the ***third party***) other than the company;

the company is taken to have made a disposition of the property constituting so much of the consideration as was given to the third party.

Subdivision B—Voidable transactions

19 At the end of subsection 588FE(1)

Add:

; and (c) a transaction of the company may be voidable because of subsection (6B) if the transaction was entered into on or after the commencement of that subsection.

20 After subsection 588FE(6A)

Insert:

(6B) The transaction is voidable if:

(a) it is a creditor-defeating disposition of property of the company; and

(b) at least one of the following applies:

(i) the transaction was entered into, or an act was done for the purposes of giving effect to it, when the company was insolvent, during the 12 months ending on the relation-back day or both after that day and on or before the day when the winding up began;

(ii) the company became insolvent because of the transaction or an act done for the purposes of giving effect to the transaction during the 12 months ending on the relation-back day or both after that day and on or before the day when the winding up began;

(iii) less than 12 months after the transaction or an act done for the purposes of giving effect to the transaction, the start of an external administration (as defined in Schedule 2) of the company occurs as a direct or indirect result of the transaction or act; and

(c) the transaction, or the act done for the purpose of giving effect to it, was not entered into, or done:

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(i) under a compromise or arrangement approved by a Court under section 411; or
(ii) under a deed of company arrangement executed by the company; or
(iii) by an administrator of the company; or
(iv) by a liquidator of the company; or
(v) by a provisional liquidator of the company.

21 Before section 588FF

Insert:

Subdivision C—Court orders about voidable transactions

22 Before subsection 588FG(1)

Insert:

If no benefit or benefit received in good faith without grounds for suspecting insolvency

23 Before subsection 588FG(2)

Insert:

If transaction entered into for valuable consideration in good faith without grounds for suspecting insolvency

24 At the end of section 588FG

Add:

If transaction is creditor-defeating disposition

(7) Subsections (1) and (2) do not apply to an order made solely on the grounds of subsection 588FE(6B) applying solely because of subparagraph 588FE(6B)(b)(iii).

(8) A court is not to make under section 588FF an order solely on the grounds of subsection 588FE(6B) if it is proved that paragraphs 588GA(1)(a) and (b) apply in relation to a person and the disposition. For the purposes of determining whether it is proved that those paragraphs apply in that way:
(a) subsections 588GA(2) to (7) apply; and

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(b) section 588GB applies as if the proceeding under section 588FF were a relevant proceeding.

(9) A court is not to make, solely on the grounds of subsection 588FE(6B) (about a creditor-defeating disposition of property), an order under section 588FF materially prejudicing a right or interest of a person other than a party to the creditor-defeating disposition if it is proved that the person later acquired the property in good faith.

25 After section 588FG

Insert:

Subdivision D—ASIC orders about certain voidable transactions

588FGAA ASIC may order undoing of effect of creditor-defeating dispositions by company being wound up

Scope of this section

(1) This section applies if:
  (a) a company for which a liquidator has been appointed has made a creditor-defeating disposition of property; and
  (b) the disposition is voidable under subsection 588FE(6B); and
  (c) a person has received any money or property as a direct or indirect result of:
    (i) the disposition; or
    (ii) the person's acquisition of the property after the disposition.

Note: The person may receive money or property as an indirect result of acquiring (by the creditor-defeating disposition or a later transaction) the property of the company that was the subject of the creditor-defeating disposition, and later disposing of that property and receiving money or property as consideration for the later disposal.

Liquidator may request order

(2) The company's liquidator may request ASIC to make an order under subsection (3). The request may be made only during the

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period beginning on the relation-back day and ending on the later of:

(a) 3 years after the relation-back day; and

(b) 12 months after the first appointment of a liquidator in relation to the winding up of the company.

ASIC must decide whether to grant the request.

Orders by ASIC

(3) ASIC may, on request under subsection (2) or on its own initiative, make one or more of the following orders in writing given to the person:

(a) an order directing the person to transfer to the company property that was the subject of the disposition;

(b) an order requiring the person to pay to the company an amount that, in ASIC's opinion, fairly represents some or all of the benefits that the person has received (directly or indirectly) because of the disposition;

(c) an order requiring the person to transfer to the company property that, in ASIC's opinion, fairly represents the application of proceeds of property that was the subject of the disposition.

Note 1: Subsection (5) sets out matters ASIC must consider in deciding whether to make an order.

Note 2: Section 588FGAB provides further for the content of orders.

Limit on power to make orders

(4) However, ASIC must not make an order under subsection (3) if ASIC has reason to believe that, if it were a court, section 588FG would prevent it from making a corresponding order under section 588FF.

Considerations in deciding whether to make orders

(5) In deciding whether to make an order under subsection (3), ASIC must have regard to the following:

(a) the conduct of the company and its officers;

(b) the conduct of the person;

(c) the circumstances, nature and terms of the disposition;

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(d) the relationship (if any) between the company and the person;
(e) any other matter ASIC considers relevant.

Revocation and amendment of orders

(6) At any time, ASIC may, in writing given to the person, revoke or amend an order under subsection (3).

Note: A court may also set aside an order made under subsection (3) of this section: see section 588FGAE.

588FGAB Content and copies of orders

Reasons

(1) An order under subsection 588FGAA(3) must include written reasons for the making of the order (including why ASIC is satisfied section 588FGAA applies).

Orders for payment

(2) An order under paragraph 588FGAA(3)(b) (requiring a person to pay a company an amount) may require the amount to be paid at a time or within a period set out in the order.

Liquidator to be given copies of orders etc.

(3) If ASIC makes an order under subsection 588FGAA(3) relating to a company, ASIC must give the company's liquidator a copy of the order, and of any revocation or amendment of the order.

588FGAC Compliance with orders generally

A person must not engage in conduct if the conduct contravenes an order under subsection 588FGAA(3).

Note: Failure to comply with this section is an offence: see subsection 1311(1).

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588FGAD Compliance with orders for payment

Enforcement of order for payment generally

(1) An amount payable by a person to a company under an order made under paragraph 588FGAA(3)(b) is recoverable by the company as a debt by action against the person in a court of competent jurisdiction.

Court order for payment if person convicted of offence

(2) If a court convicts a person of an offence based on section 588FGAC relating to a contravention by the person or someone else of an order made under paragraph 588FGAA(3)(b), the court may (in addition to imposing a penalty on the person for the offence) order the person to pay the company an amount not exceeding the amount involved in the contravention.

Complying with order for payment by transferring property

(3) A person ordered under paragraph 588FGAA(3)(b) to pay a company the value of any property may comply with the order by transferring the property to the company.

588FGAE Court may set aside order by ASIC

(1) The person subject to an order under subsection 588FGAA(3) or any other person interested in such an order may apply to a Court within the period described in subsection (2) to have the order set aside.

(2) The period is 60 days after the day the applicant was given the order or otherwise became aware of it.

(3) The Court may set the order aside if satisfied, on the basis of the written reasons for the order, that section 588FGAA did not apply.

(4) If the order is set aside, it is taken never to have been made.

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Subdivision E—Various rules about voidable transactions

26 Subsection 588FGA(1)

After "section 588FF", insert ", or ASIC makes an order under section 588FGAA,".

27 After subsection 588FGB(4)

Insert:

(4A) Subsections (3) and (4) of this section do not apply if the order mentioned in subsection 588FGA(1) was made wholly or partly because the condition in 588FE(6B)(b)(iii) was met.

28 Subsection 588FH(3)

After "section 588FF", insert "or 588FGAA".

29 Subsection 588FH(3)

After "court", insert "or ASIC".

30 Paragraph 588FI(1)(b)

After "section 588FF", insert "or 588FGAA".

31 After subsection 588FI(2)

Insert:

(2A) ASIC must not make an order under section 588FGAA that relates to the transaction and prejudices a right or interest of the creditor.

32 Division 3 of Part 5.7B (heading)

Repeal the heading, substitute:

Division 3—Duties to prevent insolvent trading and creditor-defeating dispositions

Subdivision A—Director's duty to prevent insolvent trading

33 After section 588G

Insert:

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Subdivision B—Duties to prevent creditor-defeating dispositions

588GAA Object of this Subdivision

The object of this Subdivision is to deter the practice (which may form part of the activity sometimes called phoenixing) of disposing of a company's assets to avoid the company's obligations to its creditors.

588GAB Officer's duty to prevent creditor-defeating disposition

(1) An officer of a company must not engage in conduct that results in the company making a creditor-defeating disposition of property of the company, if:
  (a) the company is insolvent; or
  (b) the company becomes insolvent because of the disposition or a number of dispositions made at the time of the disposition; or
  (c) less than 12 months after the disposition, the start of an external administration (as defined in Schedule 2) of the company occurs as a direct or indirect result of the disposition; or
  (d) less than 12 months after the disposition, the company ceases to carry on business altogether as a direct or indirect result of the disposition.

Note 1: Failure to comply with this subsection is an offence: see subsection 1311(1).

Note 2: Recklessness is the fault element for the result of the company making the creditor-defeating disposition and for paragraphs (1)(a), (b), (c) and (d): see section 5.6 of the *Criminal Code*.

(2) An officer of a company must not engage in conduct that results in the company making a disposition of property of the company, if:
  (a) one or more of the following applies:
    (i) the company is insolvent;
    (ii) the company becomes insolvent because of the disposition or a number of dispositions made at the time of the disposition;

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(iii) less than 12 months after the disposition, the start of an external administration (as defined in Schedule 2) of the company occurs as a direct or indirect result of the disposition;

(iv) less than 12 months after the disposition, the company ceases to carry on business altogether as a direct or indirect result of the disposition; and

(b) the officer knows, or a reasonable person in the position of the officer would know, that the disposition is a creditor-defeating disposition.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 588E provides for presumptions about when a company is insolvent and about matters relevant to whether a disposition is a creditor-defeating disposition.

Exceptions

(3) Subsections (1) and (2) do not apply if the disposition was made:

(a) under a compromise or arrangement approved by a Court under section 411; or

(b) under a deed of company arrangement executed by the company; or

(c) by the company's liquidator; or

(d) by a provisional liquidator of the company.

Note: Section 588GA also provides for subsections (1) and (2) of this section not to apply if the disposition was connected with a course of action likely to lead to a better outcome for the company.

588GAC Procuring creditor-defeating disposition

(1) A person must not engage in conduct of procuring, inciting, inducing or encouraging the making by a company of a disposition of property that results in the company making the disposition of the property, if:

(a) one or more of the following applies:

(i) the company is insolvent;

(ii) the company becomes insolvent because of the disposition or a number of dispositions made at the time of the disposition;

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(iii) less than 12 months after the disposition, the start of an external administration (as defined in Schedule 2) of the company occurs as a direct or indirect result of the disposition;

(iv) less than 12 months after the disposition, the company ceases to carry on business altogether as a direct or indirect result of the disposition; and

(b) the disposition is a creditor-defeating disposition.

Note 1: Failure to comply with this subsection is an offence: see subsection 1311(1).

Note 2: Recklessness is the fault element for the result of the company making the disposition and for subparagraphs (1)(a)(i), (ii), (iii) and (iv) and paragraph (1)(b): see section 5.6 of the *Criminal Code*.

(2) A person must not engage in conduct of procuring, inciting, inducing or encouraging the making by a company of a disposition of property that results in the company making the disposition of the property, if:

(a) one or more of the following applies:

(i) the company is insolvent;

(ii) the company becomes insolvent because of the disposition or a number of dispositions made at the time of the disposition;

(iii) less than 12 months after the disposition, the start of an external administration (as defined in Schedule 2) of the company occurs as a direct or indirect result of the disposition;

(iv) less than 12 months after the disposition, the company ceases to carry on business altogether as a direct or indirect result of the disposition; and

(b) the person knows, or a reasonable person in the position of the person would know, that the disposition is a creditor-defeating disposition.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 588E provides for presumptions about when a company is insolvent and about matters relevant to whether a disposition is a creditor-defeating disposition.

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Exceptions

(3) Subsections (1) and (2) do not apply if the disposition was made:
  (a) under a compromise or arrangement approved by a Court under section 411; or
  (b) under a deed of company arrangement executed by the company; or
  (c) by the company's liquidator; or
  (d) by a provisional liquidator of the company.

Note: Section 588GA also provides for subsections (1) and (2) of this section not to apply if the disposition was connected with a course of action likely to lead to a better outcome for the company.

Subdivision C—Safe harbour from breach of duties

34 Subsection 588GA(1)

After "a debt", insert ", and subsections 588GAB(1) and (2) and 588GAC(1) and (2) do not apply in relation to a person and a disposition,".

35 Paragraph 588GA(1)(b)

After "the debt is incurred", insert ", or the disposition is made,".

36 Subsection 588GA(3)

After "subsection 588G(2)", insert ", 588GAB(1) or (2) or 588GAC(1) or (2)".

37 Subsection 588GA(4)

Omit "a debt", substitute "either a debt or a disposition".

38 Paragraph 588GA(4)(a)

After "when the debt is incurred,", insert "or the disposition is made,".

39 Subsection 588GA(5)

Omit "a debt", substitute "either a debt or a disposition".

40 Paragraph 588GA(5)(a)

After "after the debt is incurred,", insert "or after the disposition is made,".

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41 Paragraph 588GA(5)(a)

After "subsection", insert "438B(2),".

42 Paragraph 588GB(2)(b)

Omit "or (c)".

43 Subsection 588GB(5)

Omit "or (c)".

44 Subsection 588GB(7) (paragraph (a) of the definition of *relevant proceeding*)

After "subsection 588G(2)", insert "or 588GAB(1) or (2) or 588GAC(1) or (2)".

45 Subsection 588H(1)

Repeal the subsection, substitute:

Application

(1) This section has effect for the purposes of:
  (a) proceedings for a contravention of subsection 588G(2) relating to the incurring of a debt at a time (the ***key time***); and
  (b) proceedings for a contravention of subsection 588GAB(2) or 588GAC(2) relating to the disposition of a company's property at a time (the ***key time***); and
  (c) proceedings under section 588M relating to the incurring of the debt or the disposition of the property.

Expectations and belief about company's solvency

46 Subsection 588H(2)

Omit "time when the debt was incurred", substitute "key time".

47 Subsection 588H(2)

Omit "even if it incurred that debt and any other debts that it incurred at that time", substitute "despite all its debts incurred, and dispositions of its property made, at that time".

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48 Subsection 588H(3)

Omit "time when the debt was incurred", substitute "key time".

49 Paragraph 588H(3)(b)

Omit "even if it incurred that debt and any other debts that it incurred at that time", substitute "despite all its debts incurred, and dispositions of its property made, at that time".

50 After subsection 588H(3)

Insert:

(3A) Subsections (2) and (3) do not apply for the purposes of proceedings relating to the disposition of the company's property if the key time was less than 12 months before:

(a) the start of an external administration (as defined in Schedule 2) of the company that occurred as a direct or indirect result of the disposition; or

(b) the company ceased to carry on business altogether as a direct or indirect result of the disposition.

Director who did not take part in management

51 Subsection 588H(4)

Omit "time when the debt was incurred", substitute "key time".

52 Before subsection 588H(5)

Insert:

Reasonable steps taken to prevent debt or disposition

53 At the end of subsection 588H(5)

Add "or making the disposition of its property".

54 At the end of subsection 588H(6)

Add "This subsection does not apply to a defence in proceedings relating to a disposition of the company's property.".

55 After subsection 588J(1)

Insert:

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(1A) If, on an application for a civil penalty order against a person for a contravention of subsection 588GAB(2) or 588GAC(2) relating to a disposition of property of a company, the Court is satisfied that:

(a) the person contravened the subsection; and

(b) one or more creditors of the company suffered loss or damage because of the disposition and the company's insolvency;

the Court may order the person to pay the company compensation equal to the loss or damage (whether or not the Court makes a pecuniary penalty order under section 1317G or an order under section 206C disqualifying the person from managing corporations).

56 At the end of subsection 588J(2)

Add ", 588GAB(2) or 588GAC(2) relating to the company".

57 Paragraph 588J(3)(a)

Omit "in relation to the incurring of a debt by that company".

58 Section 588K

Before "If:", insert "(1)".

59 At the end of section 588K

Add:

(2) If:

(a) a court finds a person guilty of an offence based on subsection 588GAB(1) or 588GAC(1) relating to disposition of property by a company; and

(b) the court is satisfied that one or more creditors of the company suffered loss or damage because of the disposition and the company's insolvency;

the court may order the person to pay the company compensation equal to the loss or damage (whether or not the court imposes a penalty for the offence).

60 After subsection 588M(1)

Insert:

(1A) This section also applies if:

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(a) a person (the ***director***) has contravened subsection 588GAB(1) or (2) or 588GAC(1) or (2) relating to disposition of property by a company; and
(b) one or more creditors of the company have suffered loss or damage because of the disposition and the company's insolvency; and
(c) the company is being wound up.

This section applies whether or not the director has been convicted of an offence relating to the contravention or a civil penalty order has been made against the director for the contravention.

61 Section 588N

After "the incurring of a debt", insert ", or the disposition of property,".

62 Paragraph 588N(a)

After "the incurring of the debt", insert "or the disposition of the property".

63 At the end of paragraph 588N(b)

Add "or the disposition of the property".

64 After subparagraph 588Q(b)(iii)

Insert:

or (iv) that that court has declared that a specified person has contravened subsection 588GAB(2) or subsection 588GAC(2) in relation to a specified disposition of property by a specified company; or
(v) that a specified person was convicted by that court for an offence constituted by a contravention of subsection 588GAB(1) or 588GAC(1) in relation to a specified disposition of property by a specified company; or
(vi) that a specified person charged before that court with an offence described in subparagraph (v) was found in that court to have committed the offence but that the court did not proceed to convict the person of the offence;

65 After subsection 588R(1)

Insert:

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(1A) If section 588M applies in relation to a company because of subsection 588M(1A), a creditor described in that subsection may begin proceedings under that section with the written consent of the company's liquidator.

66 Subsection 588R(2)

Omit "Subsection (1) has", substitute "Subsections (1) and (1A) have".

67 Paragraph 588S(a)

Repeal the paragraph, substitute:

(a) stating that the creditor intends to begin proceedings under section 588M relating to:

(i) the incurring by the company of a specified debt that is owed to the creditor; or

(ii) a specified disposition by the company of property, because of which (and the company's insolvency) the creditor has suffered loss or damage; and

68 Subparagraph 588S(b)(ii)

After "the incurring of that debt", insert ", or the making of that disposition,".

69 Subsection 588T(2)

After "the incurring by the company of the debt", insert ", or the making by the company of the disposition,".

70 Subsection 588U(1)

After "the incurring of a debt", insert ", or the making of a disposition,".

71 Paragraph 588U(1)(a)

After "in relation to the debt", insert "or disposition".

72 Paragraph 588U(1)(b)

After "the debt", insert "or the making of the disposition".

73 Paragraph 588U(1)(c)

Repeal the paragraph, substitute:

(c) the company's liquidator has intervened in an application for a civil penalty order against a person relating to:

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(i) a contravention of subsection 588G(2) relating to the incurring of the debt; or

(ii) a contravention of subsection 588GAB(2) or 588GAC(2) relating to the disposition; or

(d) the company's liquidator has requested ASIC to make an order under subsection 588FGAA(3) relating to the disposition; or

(e) ASIC has made an order under subsection 588FGAA(3) relating to the disposition.

74 Paragraph 596AD(b)

After "the incurring of a debt", insert ", or the making of a disposition,".

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Part 2—Consequential amendments of other Acts

Aged Care (Accommodation Payment Security) Act 2006

75 Subparagraph 12(3)(b)(i)

Omit "or (2B)", substitute ", (2B) or (6B)".

76 Subparagraph 12(3)(b)(ii)

After "section 588FF of that Act", insert "or a request under subsection 588FGAA(2) of that Act".

77 Subparagraph 13A(1)(d)(i)

Omit "or (2B)", substitute ", (2B) or (6B)".

78 Subparagraph 13A(1)(d)(ii)

After "section 588FF of that Act", insert "or a request under subsection 588FGAA(2) of that Act".

Banking Act 1959

79 Subsection 14C(3)

After "588G", insert ", 588GAB or 588GAC".

80 At the end of paragraph 14CA(b)

Add:

; or (iv) a creditor-defeating disposition (within the meaning of that Act) by the body corporate.

Corporations (Aboriginal and Torres Strait Islander) Act 2006

81 Paragraph 386-1(d)

Repeal the paragraph, substitute:

(d) subsections 588G(2), 588GAB(2) and 588GAC(2) of the Corporations Act (as applied by section 531-1 of this Act) (insolvent trading and creditor-defeating dispositions).

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82 Section 482-1

After "insolvent trading", insert "and creditor-defeating dispositions".

83 Part 11-6 (at the end of the heading)

Add "**and creditor-defeating dispositions**".

84 Division 531 (at the end of the heading)

Add "**and creditor-defeating dispositions**".

85 Section 531-1 (heading)

After "**insolvent trading**", insert "**and creditor-defeating disposition**".

86 Subsection 531-1(1)

After "insolvent trading", insert "and creditor-defeating disposition".

87 Subsection 531-1(1) (note)

After "insolvent trading", insert "and creditor-defeating disposition".

88 Subsection 531-1(3)

Repeal the subsection, substitute:

(3) In this Act:

Corporations Act insolvent trading and creditor-defeating disposition provisions means:

(a) Divisions 3, 4, 5 and 6 of Part 5.7B of the Corporations Act; and

(b) the other provisions of that Act (including Parts 1.2 and 9.4 and Schedule 3 but not including Parts 1.1, 1.1A and 9.4A) to the extent to which they relate to the operation of the Divisions referred to in paragraph (a); and

(c) the regulations made under that Act for the purposes of the Divisions of that Act referred to in paragraph (a) and the provisions referred to in paragraph (b).

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89 Section 531-5 (heading)

Omit "**Section 588G of Corporations Act prevails**", substitute "**Sections 588G, 588GAB and 588GAC of Corporations Act prevail**".

90 Subsections 531-5(1) and (2)

After "588G" (wherever occurring), insert ", 588GAB or 588GAC".

91 Section 700-1

Insert:

> ***Corporations Act insolvent trading and creditor-defeating disposition provisions*** has the meaning given by subsection 531-1(3).

92 Section 700-1 (definition of *Corporations Act insolvent trading provisions*)

Repeal the definition.

Insurance Act 1973

93 Subsections 62ZM(3) and 62ZOK(3)

After "588G", insert ", 588GAB or 588GAC".

94 At the end of paragraph 62ZOL(b)

Add:

; or (iv) a creditor-defeating disposition (within the meaning of that Act) by the body corporate.

Life Insurance Act 1995

95 Subsections 179(3) and 179AK(3)

After "588G", insert ", 588GAB or 588GAC".

96 At the end of paragraph 179AL(b)

Add:

; or (iv) a creditor-defeating disposition (within the meaning of that Act) by the body corporate.

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Part 3—Other amendments

Corporations Act 2001

97 Section 9 (definition of *linked*)

Repeal the definition, substitute:

linked:

(a) the incurring of a debt and a contravention of subsection 596AC(1), (2), (3) or (4) are ***linked*** if they are linked under subsection 596AC(10); and

(b) the disposition of a company's property and a contravention of subsection 596AC(1), (2), (3) or (4) are ***linked*** if they are linked under subsection 596AC(10A).

98 After subsection 596AC(10)

Insert:

Linked dispositions

(10A) If there is a contravention of this section involving a disposition of property of a company that is voidable under subsection 588FE(6B), the disposition and the contravention are ***linked*** for the purposes of this Act.

99 Subparagraphs 596AF(3)(c)(iii), (iv) and (v)

Repeal the subparagraphs, substitute:

(iii) in the case of a contravention of subsection 596AC(1), (2), (3) or (4) linked to a disposition of the company's property—whether the liquidator has requested ASIC to make an order under subsection 588FGAA(3) relating to the disposition and whether ASIC has made such an order;

(iv) whether the liquidator has intervened in an application for a civil penalty order against a person for a contravention of section 588G or subsection 588GAB(2) or 588GAC(2) relating to the incurring of a debt, or the disposition of the company's

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property, that is linked to the contravention of subsection 596AC(1), (2), (3) or (4);

(v) whether the liquidator has begun proceedings under section 588M relating to the incurring of a debt, or the disposition of the company's property, that is linked to the contravention of subsection 596AC(1), (2), (3) or (4);

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

100 In the appropriate position in subsection 1317E(3)

Insert:

Subsection 588GAB(2)	preventing creditor-defeating dispositions	corporation/scheme
Subsection 588GAC(2)	procuring creditor-defeating dispositions	corporation/scheme

101 In the appropriate position in Schedule 3

Insert:

Section 588FGAC	60 penalty units

102 In the appropriate position in Schedule 3

Insert:

Subsection 588GAB(1)	10 years imprisonment
Subsection 588GAC(1)	10 years imprisonment

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Schedule 2—Improving the accountability of resigning directors

Corporations Act 2001

1 After paragraph 188(1)(e)

Insert:

(ea) subsection 203AA(6) (notification of resignation day);

2 After section 203A

Insert:

203AA Resignation of directors—when resignation takes effect

When resignation takes effect

(1) A person's resignation as a director of a company takes effect on:

(a) if, within 28 days after the day the person stopped being a director of the company, ASIC is notified of that fact under subsection 205A(1) or 205B(5)—the day the person stopped being a director of the company; or

(b) in any other case—the day written notice is lodged with ASIC stating that the person has stopped being a director of the company.

Note 1: A director includes a person appointed to the position of alternate director, see the definition of ***director*** in section 9.

Note 2: For the application of this section, see Part 10.37.

(2) However, if:

(a) because of paragraph (1)(b), the person's resignation takes effect on a day that is not the day the person stopped being a director of the company; and

(b) the person or the company applies to ASIC or the Court for it to fix, as the day the person's resignation takes effect, the day (the ***resignation day***) that the person stopped being a director of the company; and

(c) the application is made in accordance with subsection (5); and

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(d) the applicant satisfies ASIC or the Court that the person stopped being a director of the company on the resignation day;

ASIC or the Court may fix the resignation day as the day the person's resignation takes effect.

(3) The Court must not fix the resignation day as the day the person's resignation takes effect unless it is satisfied that it is just and equitable to do so.

(4) ASIC must not fix the resignation day as the day the person's resignation takes effect unless it has had regard to:

(a) any conduct, act, omission or representation of the applicant in relation to notifying ASIC of the resignation; and

(b) the reasons for any delay in notifying ASIC of the resignation.

Application to ASIC or the Court

(5) For the purposes of paragraph (2)(c), the application:

(a) if made to ASIC—must:

(i) be made within 56 days after the day the person stopped being a director of the company; and

(ii) be lodged in the prescribed form; or

(b) if made to the Court—must be made within either:

(i) 12 months after the day the person stopped being a director of the company; or

(ii) such longer period as the Court allows.

Notification to ASIC

(6) If the Court fixes the resignation day as the day the person's resignation takes effect, the applicant must, within 2 business days after the Court fixes the resignation day, lodge with ASIC a copy of the order made by the Court that fixes the day.

(7) An offence based on subsection (6) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

Company must be left with at least 1 director

(8) This section has effect subject to section 203AB.

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203AB Resignation of directors—resignation has no effect if company has no other directors

(1) The resignation of a director of a company does not take effect if, at the end of the day that the resignation is to take effect, the company does not have at least one director.

Note: For the application of this section, see Part 10.37.

(2) However, subsection (1) does not prevent the resignation of a director of a company taking effect if the resignation is to take effect on or after the day that the winding up of the company is taken, because of Division 1A of Part 5.6, to have begun.

3 After section 203C

Insert:

203CA Resolution to remove directors—resolution is void if proprietary company has no other directors

(1) A resolution by members of a proprietary company to remove a director of the company is void if, at the end of the day that the resolution is to take effect, the company does not have at least one director.

Note: For the application of this section, see Part 10.37.

(2) However, subsection (1) does not affect the validity of a resolution by members of a proprietary company to remove a director of the company if the resolution is to take effect on or after the day that the winding up of the company is taken, because of Division 1A of Part 5.6, to have begun.

4 In the appropriate position in Chapter 10

Insert:

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Part 10.37—Transitional provisions relating to the Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020

1661 Application of amendments

(1) The amendments of section 588H by Schedule 1 to the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* apply in relation to debts incurred, and dispositions made, after the commencement of those amendments.

(2) Sections 203AA and 203AB, as inserted by Schedule 2 to the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020*, apply in relation to a person's resignation as a director of a company if the person stopped being a director of the company on or after the day that is 12 months after the day those sections commence.

(3) Section 203CA, as inserted by Schedule 2 to the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020*, applies in relation to a resolution that is to take effect on or after the day that is 12 months after the day that section commences.

5 In the appropriate position in Schedule 3

Insert:

Subsection 203AA(6)	120 penalty units

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Schedule 3—GST estimates and director penalties

A New Tax System (Goods and Services Tax) Act 1999

1 Subsection 35-5(2) (note)

After "Part 3-10", insert "and Divisions 268 and 269".

Taxation Administration Act 1953

2 Division 268 in Schedule 1 (heading)

Repeal the heading, substitute:

Division 268—Estimates

3 Section 268-1 in Schedule 1

Omit:

> (b) unpaid superannuation guarantee charge;

substitute:

> (b) unpaid superannuation guarantee charge; or
> (c) net amounts in respect of GST, wine equalisation tax and luxury car tax;

4 Section 268-1 in Schedule 1

Omit:

> If you are given an estimate, you are liable to pay the amount of the estimate. That liability is distinct from your liability to pay the amounts required by Part 2-5 or the *Superannuation Guarantee (Administration) Act 1992*. However, you can ensure that the Commissioner does not require you to pay more than the amounts not paid under that Part or Act.

substitute:

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> If you are given an estimate, you are liable to pay the amount of the estimate. That liability is distinct from your liability to pay the amounts required by Part 2-5 or the *Superannuation Guarantee (Administration) Act 1992*. In the case of an estimate of a net amount that has been assessed by the Commissioner, that liability is distinct from your liability to pay the amount of the assessment. However, you can ensure that the Commissioner does not require you to pay more than the relevant unpaid amounts.

5 At the end of section 268-5 in Schedule 1

Add:

; or (c) *net amounts under the *GST Act.

6 At the end of subsection 268-10(1) in Schedule 1

Add:

; or (c) to pay a *net amount for a *tax period, to the extent that the net amount has not been assessed before the Commissioner makes the estimate.

7 After subsection 268-10(1A) in Schedule 1

Insert:

(1B) For the purposes of this Division, if you have a *net amount for a *tax period:

(a) you are treated as being liable to pay that net amount; and

(b) that liability is treated as having arisen on the day by which you must give your *GST return for the tax period to the Commissioner in accordance with Division 31 of the *GST Act; and

(c) that liability is treated as being payable on that day; and

(d) the entire amount of that liability is treated as being unpaid.

8 Subsection 268-20(2) in Schedule 1 (example)

Omit “The Commissioner”, substitute “In a case covered by paragraph 268-10(1)(a) or (b), the Commissioner”.

9 After subsection 268-20(4) in Schedule 1

Insert:

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(4A) In a case covered by paragraph 268-10(1)(c) (estimate of liability in relation to net amount under GST Act), treat the reference in paragraph (4)(b) to the underlying liability as being a reference to a liability under Division 33 or 35 of the *GST Act for an *assessed net amount in respect of the underlying liability.

10 After subsection 268-30(4) in Schedule 1

Insert:

(4A) In a case covered by paragraph 268-10(1)(c) (estimate of liability in relation to net amount under GST Act), treat the references in paragraph (3)(a) and subsection (4) to the underlying liability as being references to a liability under Division 33 or 35 of the *GST Act for an *assessed net amount in respect of the underlying liability.

11 After subsection 268-80(1) in Schedule 1

Insert:

(1A) In a case covered by paragraph 268-10(1)(c) (estimate of liability in relation to net amount under GST Act), treat the reference in paragraph (1)(b) to the underlying liability as being a reference to a liability under Division 33 or 35 of the *GST Act for an *assessed net amount in respect of the underlying liability.

12 After subsection 268-90(2A) in Schedule 1

Insert:

(2B) In a case covered by paragraph 268-10(1)(c) (estimate of liability in relation to net amount under GST Act), the statutory declaration or affidavit must verify the following facts:

(a) your *net amount for the *tax period;

(b) what has been done to comply with Division 31 and 33 of the *GST Act (obligation to give GST return and liability in respect of assessed net amounts) in relation to that tax period;

(c) your *taxable supplies and *creditable acquisitions that are attributable to that tax period;

(d) your assessable dealings (within the meaning of the *Wine Tax Act) and *wine tax credits that are attributable to that tax period.

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13 Section 269-1 in Schedule 1

Omit:

> The directors of a company have a duty to ensure that the company either:
>
> (a) meets its obligations under Subdivision 16-B (obligation to pay withheld amounts to the Commissioner) and Division 268 in this Schedule and Part 3 of the *Superannuation Guarantee (Administration) Act 1992* (obligation to pay superannuation guarantee charge); or
>
> (b) goes promptly into voluntary administration under the *Corporations Act 2001* or into liquidation.

substitute:

> This Division deals with obligations of a company:
>
> (a) under Subdivision 16-B in this Schedule (obligation to pay withheld amounts to the Commissioner); and
>
> (b) under Division 268 in this Schedule (obligation to pay estimates); and
>
> (c) under Part 3 of the *Superannuation Guarantee (Administration) Act 1992* (obligation to pay superannuation guarantee charge); and
>
> (d) under Divisions 33 and 35 of the GST Act in respect of assessed net amounts; and
>
> (e) under Division 162 of the GST Act in respect of GST instalments.
>
> The directors of a company have a duty to ensure that the company either:
>
> (a) meets those obligations; or
>
> (b) goes promptly into voluntary administration under the *Corporations Act 2001* or into liquidation.

14 Subparagraph 269-5(a)(iii) in Schedule 1

Repeal the subparagraph, substitute:

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(iii) Part 3 of the *Superannuation Guarantee (Administration) Act 1992* (obligation to pay superannuation guarantee charge); and

(iv) Divisions 33 and 35 of the *GST Act in respect of *assessed net amounts; and

(v) Division 162 of the GST Act in respect of GST instalments (within the meaning of the GST Act); or

15 Subsection 269-10(1) in Schedule 1 (at the end of the table)

Add:

6	a *tax period ends	an *assessed net amount for the tax period in accordance with the *GST Act.
7	a GST instalment quarter (within the meaning of the *GST Act) ends	a GST instalment (within the meaning of the GST Act) for the quarter in accordance with the GST Act.

16 After paragraph 269-10(5)(b) in Schedule 1

Insert:

(ba) in the case of an estimate of an underlying liability referred to in paragraph 268-10(1)(c) (net amount under GST Act)—the ***initial day*** is the last day of the *tax period to which the estimate relates; and

17 Subsection 269-30(2) in Schedule 1 (at the end of the table)

Add:

5	an *assessed net amount for a *tax period	the last day of the 3 months after the due day,	(a) if the company, on or before the last day mentioned in column 2, lodges its *GST return, for the tax period for the relevant *net amount—the extent (if any) to which the net amount (worked out

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			from the information in the GST return and any other information that the company gives the Commissioner on or before that last day) is less than the company's assessed net amount for the tax period; or (b) otherwise—to any extent.
6	the amount of an estimate under Division 268 of a liability referred to in paragraph 268-10(1)(c) (net amount under GST Act),	the last day of the 3 months after the day by which the company was obliged to give its *GST return, for the tax period for the relevant *net amount, to the Commissioner in accordance with Division 31 of the *GST Act,	to any extent.

18 At the end of subsection 269-30(2) in Schedule 1

Add:

Note 3: This subsection will not affect the operation of subsection (1) in respect of penalties that relate to GST instalments.

19 Subsection 269-30(3) in Schedule 1

Omit "item 1 or 2", substitute "item 1, 2, 5 or 6".

20 Subsection 269-35(3A) in Schedule 1 (heading)

Repeal the heading, substitute:

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Superannuation guarantee charge and assessed net amounts—reasonably arguable position

21 Subsection 269-35(3A) in Schedule 1

After "the *Superannuation Guarantee (Administration) Act 1992*", insert "or the *GST Act".

22 Application

The amendments made by this Schedule apply in relation to:

(a) net amounts and assessed net amounts for tax periods that start on or after the commencement of this Schedule; and

(b) GST instalments for GST instalment quarters that start on or after the commencement of this Schedule.

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Schedule 4—Retention of tax refunds

Taxation Administration Act 1953

1 At the end of paragraph 8AAZLG(1)(b)

Add:

; or (iii) any provision of a taxation law (other than a provision mentioned in subparagraph (i) or (ii)).

2 Application

The amendments made by this Schedule apply to amounts that the Commissioner would have to refund, on or after the commencement of this Schedule, to an entity under section 8AAZLF of the *Taxation Administration Act 1953* (if those amendments were disregarded).

[*Minister's second reading speech made in—*
House of Representatives on 4 July 2019
Senate on 27 November 2019]

(85/19)

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