

2002

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**CORPORATIONS AMENDMENT (REPAYMENT OF
DIRECTORS' BONUSES) BILL 2002**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer,
the Hon Peter Costello MP)

52477

CORPORATIONS AMENDMENT (REPAYMENT OF DIRECTORS' BONUSES) BILL 2002

1

Outline

- 1.1. This is a Bill to amend the *Corporations Act 2001* (the Corporations Act) to permit liquidators to reclaim unreasonable payments made to directors by companies prior to a liquidation.
- 1.2. The object of the Bill is to assist in the recovery of funds, assets and other property to companies in liquidation where payments or transfers of property to directors are unreasonable.
- 1.3. The amendments relate to transactions made to, on behalf of, or for the benefit of a director or close associate of a director. To fall within the scope of the amendments, the transaction must have been unreasonable, and entered into during the 4 years leading up to a company's liquidation, regardless of its solvency at the time the transaction occurred.

2

Regulation Impact Statement and Financial Impact Statement

Regulation impact statement

2.1. Given the narrow application of the amendments contained in the Bill to companies in liquidation and that it has a low impact economy-wide, the Office of Regulation Review has advised that a Regulation Impact Statement is not required for the Bill, as the amendments are of a minor or machinery nature and will not substantially alter current arrangements.

Financial impact statement

2.2. The Bill does not have any measurable financial impact.

3

Notes on individual clauses

Clause 1: Short title

3.1. The short title of the Act is the *Corporations Amendment (Repayment of Directors' Bonuses) Act 2002*.

Clause 2: Commencement

3.2. The Bill commences on the day it receives Royal Assent.

Clause 3: Schedule(s)

3.3. Schedule 1 to the Bill contains amendments to the *Corporations Act 2001*.

Schedule 1 – Amendments

Item 1 Section 9

3.4. Item 1 inserts into section 9 the definition of “close associate” for the purpose of new section 588FDA. It means a relative of the director, or a relative of a spouse of the director. In both cases, de facto spouses are included. “Relative” is already defined under section 9.

Item 2 Section 9

3.5. This item defines “unreasonable director-related transaction” by reference to new section 588FDA.

Item 3 After section 588FD

3.6. The Corporations Act is amended by including new section 588FDA. It provides that a transaction of a company is an “unreasonable director-related transaction” if it is made to a recipient in circumstances where a reasonable person in the company’s circumstances would not have entered into the transaction. The reasonableness of the transaction is determined with regard to the respective costs and benefits to the company, and benefits to the recipient, of entering into the transaction.

3.7. Transactions covered would include payments; conveyances, transfers and other dispositions of property; the issue of securities (including options); and incurring an obligation to enter into these arrangements.

3.8. The recipients covered are directors of the company and close associates of directors. It also includes a person where the transaction is made on behalf of, or for the benefit of, a director or close associate. In Commonwealth statutes, references to “person” include bodies corporate.

3.9. Subsection 588FDA(2) provides that the reasonableness of entering into the transaction is determined at the time the company actually enters into the transaction, regardless of its reasonableness at the time the company incurred the obligation to enter the transaction.

3.10. Under subsection 588FDA(3), a transaction may be caught by the new provision regardless of whether a creditor of the company is a party to the transaction, and even if the payment was made pursuant to a court order. This mirrors existing provisions in Part 5.7B in relation to uncommercial transactions entered into by an insolvent company (subsection 588FB(2)).

Item 4 After subsection 588FE(1)

3.11. Item 4 amends subsection 588FE(1) to include reference to new subsection 588FE(6A), by providing that the provisions apply to transactions entered into on or after the commencement of the *Corporations Amendment (Repayment of Directors’ Bonuses) Act 2002*.

Item 5 After subsection 588FE(6)

3.12. Subsection 588FE(6A) establishes that an unreasonable director-related transaction will be voidable if it was entered into or given effect to within 4 years of the relation-back day (usually the date of filing of an application to wind up the company – see the definition of “relation-back day” under the Corporations Act).

Item 6 At the end of section 588FF

3.13. Subsection 588FF(4) amends the existing range of orders available to a court in relation to voidable transactions, by providing that, in the case of an unreasonable director-related transaction, the court may make orders only in relation to the unreasonable portion of the total transaction, taking into account the reasonable value (if any) that is attributable to it.

3.14. Where a transaction can also be categorised as a different type of voidable transaction for the purposes of section 588FE, the existing range of orders under section 588FF continue to apply unamended.

Item 7 Subsection 588FG(2)

3.15. The insolvency of the company at the time of an unreasonable director-related transaction is not a relevant consideration under the proposed amendments. Accordingly, section 588FG(2) is amended to remove unreasonable director-related transactions (along with unfair loans under section 588FD currently listed) from the scope of the exemption provided under that subsection in relation to knowledge of the company’s solvency at the time the transaction was entered into.