

CHAPTER 2

PURPOSE AND OUTLINE OF THE BILL

2.1 The second reading speech for the Corporations Law Amendment (Employee Entitlements) Bill 2000 advised that the purpose of the Bill was to amend the Corporations Law to increase protection for employee entitlements. This follows a number of high profile failures of corporate employers where employees were not paid the full amount of their accumulated entitlements. The speech advised that the Bill would send a very clear message to corporate employers that deliberate avoidance of obligations to employees is not acceptable.

2.2 The speech further advised that the Bill would increase protection for employee entitlements in two ways. First, by extending the existing duty on directors not to engage in insolvent trading. Second, by introducing a new criminal offence which targets agreements and transactions entered into for the purpose of avoiding payment of employee entitlements; a breach of this provision may also lead to court-ordered payment of compensation by those involved.

2.3 The Explanatory Memorandum described the provisions of the Bill.

(i) Extension of existing duty on directors not to engage in insolvent trading

2.4 The Corporations Law already includes a prohibition on insolvent trading by directors, but there is currently no duty on directors not to engage in a non-debt uncommercial transaction where the company is or becomes insolvent. An amendment of **s.588G : Director's duty to prevent insolvent trading by company** addresses this. Directors who breach this duty are liable to pay compensation under the civil penalty provisions of the Corporations Law. In certain circumstances offending directors may also be subject to criminal prosecution.

(ii) Protection of employee entitlements from agreements and transactions entered into with the intention of defeating those entitlements

2.5 This part of the legislative scheme is effected by inserting a new **Part 5.8A – Employee entitlements** to **Chapter 5 – External administration** of the Corporations Law. The provisions of the Part are summarised below.

Section 596AA : Object and coverage of Part

- the object of the new Part is to protect the entitlements of a company's employees from agreements and transactions that are entered into with the intention of defeating the recovery of those entitlements.
- the section defines entitlements as:
 - (a) wages;

- (b) superannuation contributions payable by the company;
 - (c) amounts due for injury compensation;
 - (d) leave entitlements; and
 - (e) retrenchment payments.
- the section provides that entitlements need not be owed to the employee; they could, for instance, be owed to a dependant.
 - the new protection of entitlements does not extend to employees who are or have been directors of the company or to their spouses or relatives.
 - protection of entitlements extends to both past and present employees of the company.

Section 596AB: Entering into agreements or transactions to avoid employee entitlements

- this section prohibits a person from entering into an agreement or transaction (whether formal or informal, oral or written, or with or without legal effect) with the intention or part intention of:
 - (a) preventing the recovery of entitlements of employees of a company; or
 - (b) significantly reducing the amount of entitlements that can be recovered.
- (Penalty: 1000 penalty units (at present \$110,000) or 10 years, or both. Under the general principles of criminal law, persons who aid or abet a breach of this provision would also be liable to a penalty.)
- this prohibition applies even if the company is not a party to the agreement or transaction, or if the agreement has been approved by a court.
 - this prohibition includes a series or combination of agreements and/or transactions.

Section 596AC : Person who contravenes section 596AB liable to compensate for loss

- this section provides that a person is liable to pay compensation if he or she contravenes the prohibition on agreements to avoid employee entitlements, the company is being wound up, and the employees suffer loss because of the contravention.
- a person is liable to pay compensation whether or not he or she has been convicted of an offence in relation to the contravention. (The civil standard of proof applies here, which is lower than the criminal standard that applies to the offence itself.)
- the company's liquidator may recover compensation equal to the employee's loss as a debt due to the company.
- individual employees may recover compensation equal to their loss, subject to procedures under sections 596AF to 596AI.

- proceedings for compensation must begin within 6 years after the winding up begins.

Section 596AD: Avoiding double recovery

- this section has the effect of protecting persons liable to pay compensation from double or multiple liability.

Section 596AE: Effect of section 596AC

- this section provides that actions for compensation do not preclude action for breach of any other duty, such as a breach of directors' duties.

Section 596AF: Employee may sue for compensation with liquidator's consent**Section 596AG: Employee may give liquidator notice of intention to sue for compensation****Section 596AH: When employee may sue for compensation without liquidator's consent****Section 596AI: Events preventing employee from suing**

- these provisions are intended to ensure the orderly winding up of a company. Under section 596AC the liquidator has standing to apply to the court for compensation in relation to the new offence provisions. However, if the liquidator decides not to take action, the above sections establish procedures to allow employees to apply directly to the court for compensation. The sections include safeguards and time limits based on existing provisions of the Corporations Law relating to compensation arising from insolvent trading.