2016-2017

The Parliament of the Commonwealth of Australia

HOUSE OF REPRESENTATIVES

#### **EXPOSURE DRAFT**

Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017

No. , 2017

(Treasury)

A Bill for an Act to amend the law relating to corporations, and for related purposes

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The Parliame	ent of Australia enacts:	
1 Short title		
	Act is the <i>Treasury Laws Amendment</i> (2017) tives No. 2) Act 2017.	<sup>7</sup> Enterprise
2 Commenceme	ent	
comm colum	provision of this Act specified in column 1 tences, or is taken to have commenced, in a 2 of the table. Any other statement in colling to its terms.	accordance with
Commencement in		Column 3
Commencement in Column 1 Provisions	Column 2 Commencement	Column 3 Date/Details
Column 1	Column 2	
Column 1 Provisions  1. Sections 1 to 3 and anything in this Act not elsewhere covered	Column 2 Commencement	
Column 1 Provisions  1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table  2. Schedule 1,	Column 2 Commencement The day this Act receives the Royal Assent. The day after this Act receives the Royal	

1	(2) Any information in column 3 of the table is not part of this Act.
2	Information may be inserted in this column, or information in it
3	may be edited, in any published version of this Act.
4	3 Schedules
5	Legislation that is specified in a Schedule to this Act is amended or
6	repealed as set out in the applicable items in the Schedule
7	concerned, and any other item in a Schedule to this Act has effect
8	according to its terms.

Amendments Schedule 1
Safe harbour for insolvent trading Part 1

#### Schedule 1—Amendments

2	Part 1—Safe harbour for insolvent trading
3	Corporations Act 2001
4	1 Paragraph 588E(8)(d)
5	Omit "section 588H", substitute "section 588GA or 588H".
6	2 After section 588G
7	Insert:
8 9	588GA Safe harbour—taking course of action reasonably likely to lead to a better outcome for company and its creditors
10	Safe harbour
11 12	(1) Subsection 588G(2) does not apply in relation to a person and a debt if:
13 14 15 16	<ul> <li>(a) at a particular time after the person starts to suspect the company may become or be insolvent, the person starts taking a course of action that is reasonably likely to lead to a better outcome for the company and the company's creditors;</li> </ul>
17	and
18 19 20	(b) the debt is incurred in connection with that course of action during the period starting at that time, and ending at the earliest of any of the following times:
21	(i) when the person ceases to take that course of action;
22 23 24	(ii) when that course of action ceases to be reasonably likely to lead to a better outcome for the company and the company's creditors;
25 26	(iii) when the company becomes a Chapter 5 body corporate.
27 28	Note 1: The person bears an evidential burden in relation to the defence in this subsection (see subsection (3)).
29	Note 2: For this defence to be available, certain matters must be being done to

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a reasonable standard (see subsection (4)).

30

Schedule 1 Amendments

Part 1 Safe harbour for insolvent trading

2	working out whether a course of action is reasonably likely to lead to a better outcome
3	(2) For the purposes of (but without limiting) subsection (1), in
4	working out whether a course of action is reasonably likely to lead
5	to a better outcome for the company and the company's creditors,
6	have regard to whether the person:
7	(a) is taking appropriate steps to prevent any misconduct by
8	officers or employees of the company that could adversely
9	affect the company's ability to pay all its debts; and
10	(b) is taking appropriate steps to ensure that the company is
11	keeping appropriate financial records consistent with the size
12	and nature of the company; and
13	(c) is obtaining appropriate advice from an appropriately
14	qualified entity who was given sufficient information to give
15	appropriate advice; and
16	(d) is properly informing himself or herself of the company's
17	financial position; and
18	(e) is developing or implementing a plan for restructuring the
19	company to improve its financial position.
20	(3) A person who wishes to rely on subsection (1) in a proceeding for,
21	or relating to, a contravention of subsection 588G(2) bears an
22	evidential burden in relation to that matter.
23	Matters that must be being done to a reasonable standard
24	(4) Subsection (1) does not apply if the company is failing to do any of
25	the following to a standard that would reasonably be expected of a
26	company that is not at risk of being wound up in insolvency:
27	(a) providing for the entitlements of its employees;
28	(b) giving returns, notices, statements, applications or other
29	documents as required by taxation laws (within the meaning
30	of the Income Tax Assessment Act 1997).
31	Note: Employee <i>entitlements</i> are defined in subsection 596AA(2) and
32	include superannuation contributions payable by the company.

Amendments Schedule 1 Safe harbour for insolvent trading Part 1

1		Definitions
2	(5)	In this section:
3 4		<i>better outcome</i> , for the company and the company's creditors, means an outcome that is better for both:
5		(a) the company; and
6		(b) the company's creditors as a whole;
7 8		than the outcome of the company becoming a Chapter 5 body corporate.
9 10 11		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.
12 13	588GB Int	formation or books not admissible to support the defence if failure to permit inspection etc.
14		When books or information not admissible for the defence
15	(1)	If, at a particular time:
16 17		(a) a person fails to permit the inspection of, or deliver, any books of the company in accordance with:
18 19		(i) a notice given to the person under section 477 or subsection 530B(4); or
20		(ii) an order made under section 486; or
21		(iii) subsection 477(3) or 530A(1); or
22		(b) a warrant is issued under subsection 530C(2) because the
23		Court is satisfied that a person has concealed, destroyed or
24		removed books of the company or is about to do so;
25		those books, and any secondary evidence of those books, are not
26		admissible in evidence for the person in a relevant proceeding.
27 28 29		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)).
30 31	(2)	If, at a particular time, a person fails to give any information about the company in accordance with:
32		(a) a notice given to the person under section 477; or

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Schedule 1 Amendments

Part 1 Safe harbour for insolvent trading

1	(b) subsection 530A(1) or (2);
2	that information is not admissible in evidence for the person in a
3	relevant proceeding.
4	Exception
5	(3) However, subsection (1) or (2) does not apply to a person, and a book or information, if:
7	(a) the person proves that:
8	(i) the person did not possess the book or information at any time referred to in that subsection; and
10 11	(ii) there were no reasonable steps the person could have taken to obtain the book or information; or
12	(b) each entity seeking to rely on the notice, order, subsection or
13	warrant referred to in that subsection fails to comply with
14	subsection (4) in relation to the person.
15	Notice of effect of this section must be given
16	(4) An entity that seeks to rely on a notice, order, subsection or
17 18	warrant referred to in subsection (1) or (2) must set out the effect of this section:
19 20	(a) for a notice under section 477 or subsection 530B(4)—in that notice; or
21 22	(b) for an order under section 486 or for subsection 477(3) or 530A(2)—in a written notice given to the person when the
23	entity seeks to rely on that order or subsection; or
24	(c) for a warrant issued under subsection 530C(2)—in a written
25 26	notice given to the person when the entity seeks to exercise the warrant.
26	
27 28	This subsection does not apply to an entity that seeks to rely on subsection $530A(1)$ .
29	(5) A failure to comply with subsection (4) does not affect the validity
30	of the notice, order, subsection or warrant referred to in
31	subsection (4).

Amendments Schedule 1 Safe harbour for insolvent trading Part 1

1	Definitions
2	(6) In this section:
3	relevant proceeding means a proceeding:
4	(a) for, or relating to, a contravention of subsection 588G(2); and
5	(b) in which a person seeks to rely on the defence in
6	subsection 588GA(1).
7	Example: A proceeding under section 588M.
8	3 Section 588H (heading)
9	Repeal the heading, substitute:
0	588H Other defences
1	4 Application of amendments
12	The amendments made by this Part apply in relation to:
13	(a) actions taken before, at or after the commencement of this
4	Part; and
5	(b) debts incurred at or after that commencement.

No.

Schedule 1 Amendments

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

2	arrangements or restructures
3	Corporations Act 2001
4	5 At the end of Part 5.1
5	Add:
6 7	415D Stay on enforcing rights merely because of a proceeding under this Part
8	Stay on enforcing rights
9 10	(1) A right under a contract, agreement or arrangement is, by force of this subsection, not enforceable against a Part 5.1 body merely because the Part 5.1 body is the subject of:
2	(a) an application under section 411; or
13	(b) a compromise or arrangement approved under this Part as a result of an application under section 411.
15	Note: This result is subject to subsections (3) and (4).
16 17 18	Example: A right to terminate a contract, or a right to accelerate payments by the body under a contract, will not be enforceable to the extent that those rights are triggered by the body becoming the subject of such an application, compromise or arrangement.
20	Period of the stay
21 22 23	<ul><li>(2) The right is not enforceable as described in subsection (1) during the period that:</li><li>(a) starts when the application under section 411 is made; and</li></ul>
24	(b) ends:
25 26	<ul><li>(i) when the application is withdrawn or the Court dismisses the application; or</li></ul>
27 28 29	(ii) unless subparagraph (iii) applies—at the end of any compromise or arrangement approved under this Part as a result of the application; or

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Amendments Schedule 1

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

1 2 3	resolution or order for the Part 5.1 body to be wound up—when the Part 5.1 body is wound up.
3	up when the 1 art 3.1 body is would up.
4	Application must be made to avoid insolvency
5	(3) However, subsection (1) only applies if the application under
6	section 411 states it is being made for the purpose of the Part 5.1
7	body avoiding being wound up in insolvency.
8	Rights not subject to the stay
9	(4) Subsection (1) does not apply to the right if it is:
10	(a) a right under a contract, agreement or arrangement entered
11	into after the day the order (if any) approving a compromise
12	or arrangement as a result of the application takes effect; or
13	(b) a right contained in a kind of contract, agreement or
14	arrangement:
15	(i) prescribed by the regulations for the purposes of this
16	subparagraph; or
17	(ii) declared under paragraph (5)(a); or
18	(c) a right that:
19	(i) manages financial risk (within the meaning of
20	Chapter 7) associated with a financial product (within
21	the meaning of that Chapter); and
22 23	(ii) is commercially necessary for the provision of financial products of that kind; or
24	(d) a right of a kind declared under paragraph (5)(b).
25	Note: For paragraph (a), subsection 411(10) sets out when the order takes
26	effect.
27	(5) For the purposes of subsection (4), the Minister may, by legislative
28	instrument:
29	(a) declare kinds of contracts, agreements or arrangements
30	referred to in a specified law of the Commonwealth; or
31	(b) declare kinds of rights that are commercially necessary for a
32	specified kind of contract, agreement or arrangement to be
33	entered into.

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#### Schedule 1 Amendments

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

1		Stay on Part 5.1 body's right to additional credit
2 3 4 5	(6)	If one or more rights of an entity against a Part 5.1 body are not enforceable for a period because of subsection (1), any right under a contract, agreement or arrangement that the Part 5.1 body has against the entity for the provision of additional credit is, by force
6		of this subsection, not enforceable during the same period.
7	415E Lift	ing the stay
8 9	(1)	The Court may order that subsection 415D(1) does not apply for one or more rights against a Part 5.1 body if the Court is satisfied:
10 11 12		(a) that the relevant compromise or arrangement applied for, or approved, under this Part is not for the purpose of the Part 5.1 body avoiding being wound up in insolvency; or
13		(b) that this is appropriate in the interests of justice.
14	(2)	The order may also provide that the holder of those rights may
15 16		choose to enforce those rights from the day the application under section 411 was made for the compromise or arrangement.
17 18	(3)	An application for the order may be made by the holder of those rights.
19	415F Ord	er for rights to be enforceable only with leave of the Court
20		Orders
21 22	(1)	The Court may order that one or more rights under a contract, agreement or arrangement are enforceable against a Part 5.1 body
23		only:
24		(a) with the leave of the Court; and
25		(b) in accordance with such terms (if any) as the Court imposes.
26		Example: The order could be sought for a right to terminate for convenience.
27	(2)	The Court may make the order (the <i>stay order</i> ) if:
28		<ul><li>(a) the Part 5.1 body is the subject of:</li><li>(i) an application under section 411 (the <i>section 411</i></li></ul>
29 30		application); or

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

1 2	(ii) a compromise or arrangement approved under this Part as a result of a section 411 application; and
	(b) the Court is satisfied that:
3	
4	(i) the rights are being exercised; or
5	(ii) the rights are likely to be exercised; or
6	(iii) there is a threat to exercise the rights;
7	merely because the Part 5.1 body is the subject of the
8	section 411 application, or is the subject of the compromise
9	or arrangement; and
10	(c) an application for the stay order is:
11	(i) included in the section 411 application; or
12	(ii) if a compromise or arrangement has been approved
13	under this Part as a result of the section 411
14	application—made by the person appointed to
15	administer the compromise or arrangement; and
16	(d) the section 411 application states it is being made for the
17	purpose of the Part 5.1 body avoiding being wound up in
18	insolvency.
19	(3) An order under subsection (1) must specify the period for which it
20	applies, which must not exceed the period referred to in
21	subsection 415D(2).
22	(4) Subsection (1) does not apply to a right referred to in
23	subsection 415D(4).
24	Interim orders
25	(5) Before deciding an application for a stay order, the Court may
26	grant an interim order for one or more rights under a contract,
27	agreement or arrangement not to be enforced against a Part 5.1
28	body.
29	(6) The Court must not require an applicant for a stay order to give an
30	undertaking as to damages as a condition of granting an interim
31	order.
32	6 At the end of Division 17 of Part 5.3A
33	Add:

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Schedule 1 Amendments

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

1 2	451E	Stay	on enforcing rights merely because the company is under administration
3			Stay on enforcing rights
4		(1)	A right under a contract, agreement or arrangement is, by force of
5 6			this subsection, not enforceable against a company merely because the company is under administration.
7			Note: This result is subject to subsection (4).
8 9 10			Example: A right to terminate a contract, or a right to accelerate payments by the company, will not be enforceable to the extent that those rights are triggered by the company coming under administration.
11			Period of the stay
12		(2)	The right is not enforceable as described in subsection (1) during
13			the period starting when the administration of the company begins
14			and ending:
15			(a) unless paragraph (b) or (c) applies—when the administration
16			ends; or
17 18			(b) if, within 7 days after the administration ends, an application is made for an order under subsection (3) for the company:
19 20			(i) when the application is withdrawn or the Court dismisses the application; or
21			(ii) when that order ceases to be in force; or
22			(c) if the administration ends because of a resolution or order for
23			the company to be wound up—when the company is wound
24			up.
25		(3)	The Court may order (the <i>extension order</i> ) an extension of the
26			period otherwise applying under subsection (2) for the company if:
27			(a) an order under section 444F is in force for the benefit of the
28			company; and
29			(b) the Court is satisfied that it is appropriate in the interests of
30			justice for the period applying under subsection (2) to be
31			extended; and
32			(c) the applicant for the extension order is the same as the
33			applicant for the order under section 444F.

Amendments Schedule 1

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

1 2	The extension order ceases to be in force when the order under section 444F ceases to be in force.
3	Rights not subject to the stay
4	(4) Subsection (1) does not apply to the right if it is:
5	(a) a right under a contract, agreement or arrangement entered
6	into after the day the administration of the company begins;
7	or
8	(b) a right contained in a kind of contract, agreement or
9	arrangement:
10 11	(i) prescribed by the regulations for the purposes of this subparagraph; or
12	(ii) declared under paragraph (5)(a); or
13	(c) a right that:
14	(i) manages financial risk (within the meaning of
15	Chapter 7) associated with a financial product (within
16	the meaning of that Chapter); and
17	(ii) is commercially necessary for the provision of financial
18	products of that kind; or
19	(d) a right of a kind declared under paragraph (5)(b).
20	(5) For the purposes of subsection (4), the Minister may, by legislative
21	instrument:
22	(a) declare kinds of contracts, agreements or arrangements
23	referred to in a specified law of the Commonwealth; or
24	(b) declare kinds of rights that are commercially necessary for a
25	specified kind of contract, agreement or arrangement to be
26	entered into.
27	Stay on company's right to additional credit
28	(6) If one or more rights of an entity against a company are not
29	enforceable for a period because of subsection (1), any right under
30	a contract, agreement or arrangement that the company has against
31	the entity for the provision of additional credit is, by force of this
32	subsection, not enforceable during the same period.

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Schedule 1 Amendments

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

1	451F Lifti	ing the stay
2 3 4	(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.
5 6	(2)	An application for the order may be made by the holder of those rights.
7	451G Ord	er for rights to be enforceable only with leave of the Court
8		Orders
9 10 11	(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
12		(b) in accordance with such terms (if any) as the Court imposes.
13		Example: The order could be sought for a right to terminate for convenience.
14	(2)	The Court may make the order if:
15		(a) the company is under administration; and
16		(b) the Court is satisfied that:
17		(i) the rights are being exercised; or
18		(ii) the rights are likely to be exercised; or
19		(iii) there is a threat to exercise the rights;
20		merely because the company is under administration; and
21		(c) an application for the order is made by the administrator of
22		the company.
23	(3)	An order under subsection (1) must specify the period for which it
24	, ,	applies, which must not exceed the period referred to in
25		subsection 451E(2).
26 27	(4)	Subsection (1) does not apply to a right referred to in subsection 451E(4).
28		Interim orders
29 30	(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

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Amendments Schedule 1

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

1	contract, agreement or arrangement not to be enforced against a
2	company.
3	(6) The Court must not require an applicant for an order under
4	subsection (1) to give an undertaking as to damages as a condition
5	of granting an interim order.
5	7 Application of amendments
7	The amendments made by this Part apply in relation to rights arising
3	under contracts, agreements or arrangements entered into at or after the
3	under contracts, agreements or arrangements entered into at or after the commencement of this Part.

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