

EXPLANATORY STATEMENT

Minute No. of 2012 – Parliamentary Secretary to the Treasurer

Subject - *Corporations Act 2001*
Corporations (Fees) Act 2001
Corporations Legislation Amendment Regulations 2012 (No.)

Subsection 1364(1) of the *Corporations Act 2001* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 1367A(1) of the *Corporations Act 2001* (the Act) provides that regulations may be made that determine when a person will be taken to have complied with a requirement of the Act to lodge a notice in a 'prescribed manner'.

The *Corporations Amendment (Phoenixing and Other Measures) Act 2012* (Phoenixing Act) will, upon proclamation, amend the *Corporations Act 2001* (Corporations Act) to require the publication of notices relating to events before, during and after the external administration of a company in a 'prescribed manner'. Prior to the Phoenixing Act, the Corporations Act included a number of requirements to publish notice of insolvency events in the print media or in the ASIC Gazettes. The Phoenixing Act removed these print media and gazettal notification requirements and provided the necessary power to allow for the prescription of the manner of publication of insolvency notices to be determined through regulations.

The Regulations amend the *Corporations Regulations 2001* (the Principal Regulations) to prescribe the manner of publication of corporate insolvency notices to satisfy a liquidator's publication obligations under the Act.

The Regulations:

- require the establishment of a website by ASIC for the publication of insolvency notices (the new website);
- provide that liquidators lodgement requirements under the Act are only be satisfied where the notices are lodged on the new website, in the format required by ASIC, and the requisite fee is paid; and
- state the information required to be provided by liquidators in complying with the notification obligations.

The Regulations also make miscellaneous amendments to remove previously prescribed forms that set out the information required in gazettal or newspaper advertisements.

Section 8 of the *Corporations (Fees) Act 2001* (the Fees Act) provides that the Governor-General may make regulations for the purposes of sections 5, 5A and 6 of the Fees Act, which deal with the imposition of fees for things done under the Act.

Subsection 5(1) of the Fees Act provides that regulations may prescribe fees for chargeable matters, which includes the lodgement of a document under the Corporations Act. Subsection 5(2) of the Fees Act provides that these fees are imposed as taxes. Subsection 6(2) of the Fees Act provides that the fee for a chargeable matter does not need to have any relationship with the cost of providing the service that forms part of, or is related to, that matter.

The Regulations also amend the *Corporations (Fees) Regulations 2001* (the Fee Regulations) to provide for the charging of fees for the publication of these notices.

Different fees are set for the publication of notices that previously were required to be gazetted, from those previously required to be published in a daily state-wide or national newspaper. The fees are structured in the first year to maintain the status quo by reflecting the current cost of publication of an advertisement in the ASIC business gazette of \$64, and the lowest cost for a newspaper advertisement in a State-wide newspaper of \$400. To increase savings to external administrations, the \$400 cost is reduced to \$145 from 1 July 2013.

It is expected that the transfer to electronic publication of notices will result in approximately \$15 million in savings to the insolvency industry over the first four years of operation of the insolvency notices website.

Details of the Regulations are set out in the Attachment.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on the commencement of Schedule 1 of the Phoenixing Act. A separate minute recommends that Schedule 1 to that Act commence by Proclamation on 1 July 2012.

..... Parliamentary Secretary to the Treasurer

Authority: Subsection 1364(1) of the
Corporations Act 2001

Regulation 1 – Name of Regulations

This regulation provides that the name of the Regulations is the Corporations Legislation Amendment Regulations 2012 (No.).

Regulation 2 – Commencement

Schedule 1 of the Regulations will commence at the same time as the commencement of Schedule 1 of the Phoenixing Act.

Part 1 of the Schedule 2 commences on the later of 1 July 2012 or the commencement of Schedule 1 of the Corporations Amendment (Phoenixing and Other Measures) Act 2012.

Part 2 of Schedule 2 commences on 1 July 2013

Regulation 3 – Amendment of the Corporations Regulations 2001

This regulation provides that Schedule 1 of the Regulations amend the Corporations Regulations 2001.

Regulation 4 – Amendment of Corporations (Fees) Regulations 2001

This regulation provides that Schedule 2 of the Regulations amend the Corporations (Fees) Regulations 2001.

Regulation 5 – Amendment of Corporations (Fees) Regulations 2001

This regulation provides that Schedule 3 of the Regulations amend the Corporations (Fees) Regulations 2001.

Schedule 1 Amendment of Corporations Regulations 2001

Regulation 5.3A.03A Notice of first meeting of creditors

Paragraph 436E(3)(b) of the Corporations Act requires an administrator to cause notice of the meeting of creditors to be published in the print media at least five business days prior to the creditors meeting. The Phoenixing Act amends the Corporations Act to provide that the administrator must cause a notice setting out prescribed information to be published in the prescribed manner.

Regulation 5.3A.03A provides that the prescribed information for paragraph 436E(3)(b) is the name of the company; any trading name of the company; the Australian Company Number; the sections of the Act under which the notice is sent out; the date, time and place for the meeting; the purpose of the meeting; the time to submit proof of debts or proxies for the meeting; the contact details of the administrator; the date the administrator was appointed and the section that the administrator was appointed under.

Regulation 5.3A.03AB Notice of meeting to inform creditors

Paragraph 439A(3)(b) of the Corporations Act requires an administrator to cause notice of the meeting to be published in the print media of the second meeting of creditors. The Phoenixing Act amends the Corporations Act to provide that rather than this notice being required to be published in

the print media, the notice setting out information about the meeting must be published in the prescribed manner.

Regulation 5.3A.03AB provides that the prescribed information for paragraph 439A(3)(b) is the name of the company; any trading name of the company; the Australian Company Number; the sections of the Act under which the notice is sent out; the date, time and place for the meeting; the purpose of the meeting; the time to submit proof of debts or proxies for the meeting and the contact details of the administrator .

Regulation 5.3A.06A Notice of resolution to wind up voluntarily

Section 446A of the Corporations Act provides that where the creditors of a company in administration resolve at the conclusion of the administration to wind up the company, or the company fails to comply with the deed of company arrangement within the statutory timeframe, the company is taken to have passed a special resolution that it be wound up voluntarily.

The previous subparagraph 446A(5)(b) the liquidator must provide notice in the print media that the company is taken to have passed the special resolution to wind up has been replaced through the Phoenixing Act with a requirement to publish a notice containing the prescribed information, in the prescribed manner.

Regulation 5.3A.06A provides that the prescribed manner for subparagraph 446A(5)(b) is publication of notice of the special resolution within 15 days of the date that the special resolution was passed that the company be wound up voluntarily. Pursuant to section 1367A, this will require the liquidator to electronically lodge the notice with ASIC for publication on the insolvency notices website.

Regulation 5.3A.06AB Notice of meeting of creditors

Section 449C of the Corporations Act provides that if an administrator of a company needs to be replaced, the entity or person who appointed the administrator is able to appoint a replacement. Following the appointment of the replacement, a meeting of creditors must be convened to give the creditors as a whole an opportunity to appoint a different liquidator.

The requirement in paragraph 449C(5)(b) that there must be noticed published in the print media is to be replaced with a requirement that there be a notice setting out prescribed information about the meeting must be published in the prescribed manner.

Regulation 5.3A.06AB provides that the prescribed information for subparagraph 449C(5)(b) is the name of the company; any trading name of the company; the Australian Company Number; the sections of the Act under which the notice is sent out; the date, time and place for the meeting; the purpose of the meeting; the time to submit proof of debts or proxies for the meeting; the contact details of the administrator.

Regulation 5.3A.07(5)(b) Administrator becomes liquidator – additional cases

Regulation 5.3A.05 sets out circumstances where an administrator appointed to a company becomes the liquidator under subsection 446B(1) of the Corporations Act.

In such cases, by operation of paragraph 5.3A.07(2) a company is considered to have passed a special resolution for the company to be wound up.

The requirement under regulation 5.3A.07 that the liquidator cause a notice to be published in the print media of the passing of the special resolution is replaced with a requirement that the liquidator lodge notice of the resolution in accordance with regulation 5.6.75(4).

Regulation 5.3A.07A Notice of appointment of administrator

Section 450A of the Corporations Act provides that following an administrator's appointment to a company, the administrator must lodge notice of their appointment with ASIC by the end of the day of their appointment and to publish notice of their appointment in the print media.

The requirement to publish notice of their appointment in the print media within three business days was replaced through the Phoenixing Act with a requirement to cause notice of the appointment to be published with a notice setting out prescribed information in the prescribed manner. The prescribed information about the appointment is the name of the company; the trading name of the company; the ACN of the company; the sections of the Act under which the notice is given; the name and contact details of the administrator; the date the administrator was appointed and the section of the Act under which the administrator was appointed.

Under regulation 5.3A.07A, the liquidator must publish notice of their appointment within three business days of their appointment. Pursuant to section 1367A, this will require the liquidator to electronically lodge the notice with ASIC for publication on the insolvency notices website.

Regulation 5.4.01A Notice of application to wind up a company

Paragraph 465A(c) of the Corporations Act provides that where an application to wind up a company is made to the Court, the applicant must notify ASIC that the application has been made, serve a copy of the application on the company, and advertise the application in print media in accordance with the relevant Court rules.

The Bill amends the Corporations Act to provide that rather than advertise the application as required by the Court rules, that the notice setting out the prescribed information about the application must be published in the prescribed manner.

Regulation 5.4.01A provides that the prescribed information for the notice is: the name of the company; any trading name of the company; the ACN of the company; the date on which the application was filed; the file number given to it by the Court for the application; the name and address for service of the applicant and the location of the Court; the time and date of the hearing and the way that documents that are filed in relation to the application may be obtained.

Regulation 5.4C.01 Notice of Intention to order winding up of a company

Section 489EA of the Corporations Act provides that ASIC is to publish notice of its intention to make an order under subsection 489EA(1) to (4) to wind up an abandoned company in the prescribed manner.

Regulation 5.4C.01 prescribes the manner for ASIC to publish a notice of intention on the insolvency notices website and provides that the notice must be published 10 business days prior to ASIC making an order.

Regulation 5.5.01 Notice of resolution to wind up voluntarily

Sections 490 and 491 of the Corporations Act provide that a company may voluntarily resolve to be wound up upon the passage of a special resolution of the company's members, unless an application

for the winding up of the company has been filed, an order for the winding up of the company has been made, or the company is an active trustee company.

The requirement under paragraph 491(2)(b) to publish a notice of the passing of the resolution in the ASIC Gazette within 21 days of the resolution was replaced with a requirement to publish the notice setting out prescribed information in the prescribed manner.

Regulation 5.5.01 provides that the prescribed manner for paragraph 491(2)(b) is that the liquidator must publish notice within 21 days after the special resolution to wind up the company voluntarily is passed. Pursuant to section 1367A, this will require the liquidator to electronically lodge the notice with ASIC for publication on the insolvency notices website.

The prescribed information about the resolution to be set out in the notice includes: the name of the company; the trading name of the company; the Australian Company Number; the section of the Act under which the notice is being given; the contact details of the liquidator and the date the resolution was passed.

Regulation 5.5.02 Notice of meeting of creditors

Section 497 of the Corporations Act provides that the liquidator of a company placed into a creditors' voluntary winding up must convene a meeting of the company's creditors within 11 days after the day of the meeting of the company at which the resolution for the winding up of the company was passed. This initial meeting is an opportunity for the creditors to remove the liquidator and appoint a replacement.

The requirement under section 497 to publish a notice of this meeting in the print media was replaced through the Phoenixing Act with a requirement to arrange for the notice setting out the prescribed information about the meeting to be published in the prescribed manner.

Regulation 5.5.02 provides that the notice requirements under paragraph 497(2)(d) of the Corporations Act will be satisfied where the liquidator publishes a notice at least 7 days but not before 14 days prior to the meeting of the company's creditors.

Subregulation 5.6.14A(1)

In relation to meetings convened under regulation 5.6.14A, there is currently a requirement on the convenor of the meeting to advertise the meeting in each State or Territory in which the company carries on business, or has carried on business in the two years prior to the meeting, in a daily newspaper in each State or Territory.

The current requirement is to be replaced with a requirement to lodge notice of the meeting with ASIC in accordance with subregulation 5.6.75(4). ASIC is then required to publish the notice received on the ASIC Insolvency Notices website.

Subregulation 5.6.14A(2)

The prescribed information for the notice required by regulation 5.6.14A is the name of the company; the trading name of the company; the ACN of the company; the section of the Act under which the notice is being given; the time, date and place of the meeting; the business to be conducted at that meeting; the time to lodge proofs of debts of proxies for the meeting and the contact details of the administrator.

Subregulation 5.6.39(2) and (3)

A liquidator is required under regulation 5.6.39 to set a time for creditors to submit particulars of proof of debts or the credits claims.

The current requirement on the liquidator to give notice of this date for creditors to submit particulars of claim is to advertise the date in the print media.

Subregulations 5.6.39(2) and (3) are replaced with a requirement to lodge with ASIC in accordance with 5.6.75(4).

The prescribed information for subregulation 5.6.39(2) and (3) is that the notice must set out the name of the company; any trading name of the company; the ACN of the company and the day that creditors are to submit proofs of debts.

Paragraph 5.6.48(2)(a) and 5.6.48(3)

If a liquidator does not admit creditor's debts or claims, the liquidator can set a date by which creditors, whose claims have not been admitted, must lodge proof of debts to formally prove their debts or claims.

The requirement that the liquidator advertise the date on which claims are to be lodged for formal proof in the print media, is to be replaced with a requirement that the liquidator lodge with ASIC a notice in accordance with subregulation 5.6.75(4).

As there is no longer a requirement to lodge an advertisement in the print media, this requirement on the form of the advertisement under subregulation 5.6.48(3) has also been omitted.

Subregulation 5.6.48(3)

The notice required under this subregulation must include the name of the company, any trading name of the company, the Australian Company Number and the date required by subregulation 5.6.48(1).

Paragraph 5.6.65(1)(a)

A liquidator is required to give notice of their intention to declare a dividend, two months prior to when they will actually declare the dividend.

The requirement that the liquidator give notice via the ASIC gazette is to be replaced with a requirement that the liquidator lodge notice in accordance with subregulation 5.6.75(4).

Subregulation 5.6.65(2)

The notice required under this subregulation must include the name of the company, any trading name of the company, the Australian Company Number.

Regulation 5.6.69

If a liquidator decides to postpone the declaration of a dividend past the date that was shown on the notice lodged with ASIC the liquidator must lodge a further notice under subregulation 5.6.75(4) setting out the new date for when the dividend will be declared.

Regulation 5.6.70B

Under subsection 568A(2) of the Act a liquidator of a company may disclaim certain types of company property. In certain circumstances, the liquidator must ensure notice of the disclaimer is published in the print media.

The Bill replaces this requirement to advertise in the print media, with a requirement to publish the notice setting out information about the meeting in the prescribed manner. The prescribed manner is to lodge notice under subregulation 5.6.75(4).

The prescribed information about the disclaimer is the name of the company; any trading name of the company; the Australian Company Number; the description of the property, the paragraph under subsection 568(1) under which the property is disclaimed, the date the Court gave leave to disclaim the contract and the contact details of the liquidator.

Regulation 5.6.75 Publication in the prescribed manner

Subregulation 5.6.75(1) provides that ASIC is required to establish and maintain a website for insolvency notices. ASIC is to publish on this website documents that have been lodged with ASIC under Parts 5.3A, 5.4, 5.4C, 5.5 or 5.6 of the Corporations Act.

Regulation 5.6.75(2) provides that the prescribed manner for ASIC to publish any notice lodged with it is to publish it on the publication website.

Regulation 5.6.75(3) provides that a person (other than ASIC) is taken to have complied with a requirement to lodge a notice in the prescribed manner if they lodge the document with ASIC and that the document is lodged in a format that ASIC has approved.

Regulation 5.6.75(4) sets out what must occur for the person to have lodged a document for the purposes of the section 1367A of the Corporations Act. The person must pay the fee set out in these regulations, send the notice in an electronic communication to the portal for the ASIC Insolvency Notices website in a format that ASIC has approved, and receive an electronic communication confirming both the payment has been received and the notice has been lodged.

Regulation 5.6.75(5) provides that once ASIC receives a document lodged with it, it must publish the notice, or a copy of it, on the insolvency notices website.

Electronic communication is defined in subsection 5(1) of the *Electronic Transactions Act 1999*.

Schedule 2 Amendment of Corporations (Fees) Regulations 2001

Part 1

The amendments to the Corporations (Fees) Regulations provide that for the financial year ending on 30 June 2013, where there has been a print media advertising requirement replaced with a requirement to lodge a notice with ASIC, the fee for lodgment of the notice is \$400.

In relation to where there is a requirement to gazette notices being replaced with a requirement to lodge a notice with ASIC, the fee for lodgment of the notice is \$64.

Part 2

These regulations will commence on 1 July 2013.

In relation to where there has been a print media advertising requirement replaced with a requirement to lodge a notice with ASIC, the fee for lodgment of the notice is reduced to \$145.