

EXPOSURE DRAFT

2010-2011-2012

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

EXPOSURE DRAFT NO. 1 (January 2012)

This draft covers legislation administered by the Treasury (other than tax legislation). A second exposure draft covering other legislation will be released later in the first quarter of 2012.

Personal Liability for Corporate Fault Reform Bill 2012

No. , 2012

(Treasury)

**A Bill for an Act to amend the law relating to
personal liability for offences committed by
corporations, and for related purposes**

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1 **A Bill for an Act to amend the law relating to**
2 **personal liability for offences committed by**
3 **corporations, and for related purposes**

4 The Parliament of Australia enacts:

5 **1 Short title**

6 This Act may be cited as the *Personal Liability for Corporate*
7 *Fault Reform Act 2012*.

8 **2 Commencement**

9 This Act commences on the day after this Act receives the Royal
10 Assent.

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1 **3 Schedule(s)**

2 Each Act that is specified in a Schedule to this Act is amended or
3 repealed as set out in the applicable items in the Schedule
4 concerned, and any other item in a Schedule to this Act has effect
5 according to its terms.
6

1
2 **Schedule 1—Corporations Act 2001**
3

4 **1 Section 188**

5 Repeal the section, substitute:

6 **188 Responsibility of secretaries etc. for certain corporate**
7 **contraventions**

8 *Responsibility of company secretaries*

9 (1) A secretary of a company contravenes this subsection if the
10 company contravenes any of the following provisions (a *corporate*
11 *responsibility provision*):

- 12 (a) section 142 (registered office);
13 (b) section 145 (public company's registered office to be open to
14 public);
15 (c) section 146 (change of principal place of business);
16 (d) section 178A (change to proprietary company's member
17 register);
18 (e) section 178C (change to proprietary company's share
19 structure);
20 (f) section 205B (lodgement of notices with ASIC);
21 (g) section 254X (issue of shares);
22 (h) section 319 (lodgement of financial reports);
23 (i) section 346C (response to extract of particulars);
24 (j) section 348D (response to return of particulars);
25 (k) section 349A (change to proprietary company's ultimate
26 holding company);
27 (l) section 1302 (location of registers).

28 Note 1: See section 204A for the circumstances in which a company must
29 have a secretary.

30 Note 2: This subsection is a civil penalty provision (see section 1317E).

31 *Responsibility of directors of proprietary companies*

32 (2) Each director of a proprietary company contravenes this subsection
33 if:

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2TSchedule 12T Corporations Act 2001

- 1 (a) the proprietary company contravenes a corporate
2 responsibility provision; and
3 (b) the proprietary company does not have a secretary when it
4 contravenes that provision.

5 Note 1: See section 204A for the circumstances in which a company must
6 have a secretary.

7 Note 2: This subsection is a civil penalty provision (see section 1317E).

8 *Defence of reasonable steps*

- 9 (3) A person does not contravene subsection (1) or (2) in relation to a
10 company's contravention of a corporate responsibility provision if
11 the person shows that he or she took reasonable steps to ensure that
12 the company complied with the provision.

13 *Location of registers—responsibility of all officers and employees*

- 14 (4) Without limiting subsections (1) and (2), if a company contravenes
15 section 1302 (location of registers), an officer or employee of the
16 company contravenes this subsection if the officer or employee
17 was involved in the company's contravention.

18 Note 1: Section 79 defines *involved*.

19 Note 2: This subsection is a civil penalty provision (see section 1317E).

20 **2 Subsection 208(1) (note)**

21 Omit "Note", substitute "Note 1".

22 **3 At the end of subsection 208(1)**

23 Add:

24 Note 2: For the criminal liability of a person dishonestly involved in a
25 contravention of this subsection, see subsection 209(3). Section 79
26 defines *involved*.

27 **4 Subsection 254J(1) (note)**

28 Omit "Note", substitute "Note 1".

29 **5 At the end of subsection 254J(1)**

30 Add:

31 Note 2: For the criminal liability of a person dishonestly involved in a
32 contravention of this section, see subsection 254L(3). Section 79
33 defines *involved*.

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Corporations Act 2001 2TSchedule 12T

1 **6 Section 254K (note)**

2 Omit “Note”, substitute “Note 1”.

3 **7 At the end of section 254K**

4 Add:

5 Note 2: For the criminal liability of a person dishonestly involved in a
6 contravention of this section, see subsection 254L(3). Section 79
7 defines *involved*.

8 **8 Subsection 254Q(13)**

9 Omit “and any officer of the company who is involved in the
10 contravention are each”, substitute “is”.

11 **9 At the end of subsection 256B(1)**

12 Add:

13 Note 4: For the criminal liability of a person dishonestly involved in a
14 contravention of subsection 256D(1) based on this subsection, see
15 subsection 254D(4). Section 79 defines *involved*.

16 **10 Subsection 256D(4)**

17 Omit “section 256B”, substitute “subsection (1)”.

18 **11 At the end of section 259A**

19 Add:

20 Note: For the criminal liability of a person dishonestly involved in a
21 contravention of this section, see subsection 259F(3). Section 79
22 defines *involved*.

23 **12 At the end of subsection 259B(1)**

24 Add:

25 Note: For the criminal liability of a person dishonestly involved in a
26 contravention of this subsection, see subsection 259F(3). Section 79
27 defines *involved*.

28 **13 At the end of subsection 260A(1)**

29 Add:

30 Note: For the criminal liability of a person dishonestly involved in a
31 contravention of this section, see subsection 260D(3). Section 79
32 defines *involved*.

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2TSchedule 12T Corporations Act 2001

1 **14 Subsection 319(5A)**

2 Repeal the subsection (including the note).

3 **15 At the end of subsection 328A(4)**

4 Add:

5 Note: An officer of a company, or of a responsible entity, is in default if the
6 officer is involved in the contravention of subsection (1) by the
7 company, the company's directors or the entity (see section 83).
8 Section 79 defines *involved*.

9 **16 At the end of subsection 328B(2)**

10 Add:

11 Note: An officer of a company is in default if the officer is involved in the
12 company's contravention of subsection (1) (see section 83).
13 Section 79 defines *involved*.

14 **17 Subsection 601FC(6)**

15 Repeal the subsection.

16 **18 Subsection 1302(3)**

17 Repeal the subsection, substitute:

18 (3) If default is made in complying with subsection (1) in its
19 application to any register of a company by any of the following
20 persons, the person is guilty of an offence:
21 (a) the company;
22 (b) a person who has arranged with the company to make up the
23 register on its behalf.

24 Note: A person mentioned in paragraph (b) is in default if the person is
25 involved in the company's contravention of subsection (1) (see
26 section 83). Section 79 defines *involved*.

27 **19 Subsection 1302(5)**

28 Omit "and any officer of the company who is in default are each",
29 substitute "is".

30 **20 After paragraph 1317E(1)(a)**

31 Insert:

32 (aa) subsection 188(1), (2) or (4) (responsibilities of secretaries
33 etc. for certain corporate contraventions);

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1 **21 After subsection 1317G(1B)**

2 Insert:

3 *Responsibilities of secretaries etc. for certain corporate*
4 *contraventions*

5 (1BA) Without limiting subsection (1), if a declaration of contravention
6 by a person of subsection 188(1), (2) or (4) has been made under
7 section 1317E, a Court may order the person to pay the
8 Commonwealth a pecuniary penalty of up to \$3,000.

9 **22 Schedule 3 (cells at table items 9, 12, 13, 29A and 29B,**
10 **column headed “Penalty”)**

11 Repeal the cells, substitute:
12 60 penalty units.

12 **23 Schedule 3 (table item 31)**

13 Repeal the item.

14 **24 Schedule 3 (cell at table item 44, column headed**
15 **“Penalty”)**

16 Repeal the cell, substitute:
17 60 penalty units or imprisonment for 1 year, or both.

17 **25 Schedule 3 (cell at table item 84, column headed**
18 **“Penalty”)**

19 Repeal the cell, substitute:
20 60 penalty units.

20 **26 Schedule 3 (cell at table item 112, column headed**
21 **“Penalty”)**

22 Repeal the cell, substitute:
23 60 penalty units or imprisonment for 1 year, or both.

23 **27 Schedule 3 (cells at table items 118, 119B and 119C,**
24 **column headed “Penalty”)**

25 Repeal the cells, substitute:
26 60 penalty units.

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2TSchedule 12T Corporations Act 2001

1 **28 Schedule 3 (table item 163A)**

2 Repeal the item.

3 **29 Schedule 3 (after table item 333)**

4 Insert:

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333A	Subsection 1302(3)	60 penalty units.
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333B	Subsection 1302(5)	60 penalty units.
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Foreign Acquisitions and Takeovers Act 1975 **2TSchedule 22T**
Main amendments **0TPart 10T**

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Schedule 2—Foreign Acquisitions and Takeovers Act 1975

Part 1—Main amendments

1 Section 30 (heading)

Repeal the heading, substitute:

30 Offences—orders under Part II

2 Subsection 31(1)

Omit “(1)”.

3 Subsection 31(1)

Omit “an officer of the corporation who is in default”, substitute “an officer of the corporation who authorised or permitted the commission of the offence”.

4 Subsection 31(2)

Repeal the subsection.

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2TSchedule 22T Foreign Acquisitions and Takeovers Act 1975

0TPart 20T Signalling personal fault: main amendments

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Part 2—Signalling personal fault: main amendments

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5 Multiple amendments

4

The provisions of the *Foreign Acquisitions and Takeovers Act 1975*
listed in this Part are amended by adding at the end:

5

6

Note: For the criminal liability of an officer of a corporation if the
corporation contravenes or fails to comply with an order under this
subsection, see sections 30 and 31.

7

8

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6 Subsections 18(2), (3) and (4)

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7 Subsections 19(2), (3) and (4)

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8 Subsections 20(2) and (3)

12

9 Subsections 21(2) and (3)

13

10 Subsections 21A(2), (3) and (4)

14

11 Subsection 22(1)

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Foreign Acquisitions and Takeovers Act 1975 2TSchedule 22T
Signalling personal fault: further amendments 0TPart 30T

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Part 3—Signalling personal fault: further amendments

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12 Multiple amendments

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The provisions of the *Foreign Acquisitions and Takeovers Act 1975*
listed in this Part are amended by adding at the end:

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Note: For the liability of an officer of a corporation, see section 31.

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13 Subsection 25(1C)

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14 Subsection 26(2)

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15 Subsection 26A(2)

11

16 Subsection 30(1)

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17 Subsection 36(2)

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2TSchedule 32T Insurance Contracts Act 1984

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Schedule 3—Insurance Contracts Act 1984

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1 At the end of subsections 11C(2) and 11D(2) and (3)

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Add:

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Note: For the liability of a director, employee or agent of an insurer, see section 11DA.

7

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2 After section 11D

9

Insert:

10

11DA Supervisory powers—liability of directors, employees and agents of insurers

11

12

(1) A person (the *responsible person*) commits an offence if:

13

(a) the responsible person is:

14

(i) a director of a company that is an insurer; or

15

(ii) an employee or agent of an insurer; and

16

(b) the responsible person permits or authorises the insurer to engage in conduct; and

17

(c) the conduct constitutes an offence (the *insurer offence*) against subsection 11C(2) or 11D(2) or (3); and

18

(d) the insurer commits the insurer offence.

19

Penalty: 150 penalty units.

20

(2) There is no fault element for the physical element described in paragraph (1)(d) other than the fault elements (if any) for the physical elements of the insurer offence.

21

22

(3) To avoid doubt:

23

(a) an insurer does not commit the insurer offence, for the purposes of subsection (1), if the insurer has a defence to the insurer offence; and

24

25

(b) a person may be convicted of an offence against subsection (1) even if the insurer concerned has not been prosecuted for, or convicted of, the insurer offence.

26

27

28

(4) In this section:

29

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Insurance Contracts Act 1984 2TSchedule 32T

- 1 *conduct* means:
2 (a) an act; or
3 (b) an omission to perform an act.
- 4 *engage in conduct* means:
5 (a) do an act; or
6 (b) omit to perform an act.

- 7 **3 Section 76A**
8 Repeal the section.
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2TSchedule 42T Pooled Development Funds Act 1992

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Schedule 4—Pooled Development Funds Act 1992

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5

1 Section 50

6

Repeal the section.

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2 Section 51 (heading)

8

Repeal the heading, substitute:

9

51 Offences—failure to comply with directions or requirements

10

3 Subsection 51(2)

11

Omit “, not being a PDF,”.