

1993

THE PARLIAMENT OF THE COMMONWEALTH OF
AUSTRALIA

SENATE

THE INSOLVENCY (TAX PRIORITIES) LEGISLATION
AMENDMENT BILL 1993

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Treasurer,
the Hon John Dawkins, M.P.)

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General Outline and Financial Impact

The Insolvency (Tax Priorities) Legislation Amendment Bill 1993 will amend various Acts, in particular, the *Income Tax Assessment Act 1936* and the Corporations Law. The amendments proposed will:

- abolish the existing priority of the Commissioner of Taxation for tax debts in relation to certain unremitted amounts which become payable after 30 June 1993 (Chapter 1 of the Explanatory Memorandum).
- establish a new regime to enable the Commissioner to recover those debts earlier and more effectively. The main elements of the new regime are:
 - the Commissioner being able to initiate recovery action for an unremitted amount on the basis of an estimate of that amount (Chapter 2 of the Explanatory Memorandum); and
 - the imposition of a penalty on company directors equal to their company's unremitted amounts or an estimate thereof (of the Explanatory Memorandum).

The Bill also contains consequential amendments to the Corporations Law, the *Bankruptcy Act 1966* and the *Crown Debts (Priority) Act 1981*. These amendments are necessary to place the Commissioner in the same position as other creditors (Part B of the Explanatory Memorandum).

Proposal announced: Aspects of the proposal were announced in a joint statement by the Treasurer and the Attorney General on 2 December 1992.

Date of effect: Apply to unremitted amounts which become payable after 30 June 1993.

Financial impact: Any loss of revenue from abolishing the Commissioner's priority is expected to be offset by revenue collected under the new recovery regime.

Clauses involved in the proposed amendments

Preliminary

Clause 1: stipulates the short title of the Act as being the *Insolvency (Tax Priorities) Legislation Amendment Act 1993*.

Clause 2: stipulates the commencement date of the provisions of the Bill.

Income Tax Assessment Act 1936

Clause 3: defines "Principal Act" as being the *Income Tax Assessment Act 1936*.

Clause 4: extends the meaning of "tax" in section 215 of the Principal Act to refer to liabilities in relation to unremitted amounts.

Clause 5: extends the meaning of "tax" and "taxpayer" in section 218 of the Principal Act to refer to liabilities in relation to unremitted amounts.

Clause 6: relocates the liability of an employer under subsection 221P(1) when deductions made are not applied in the appropriate manner in relation to purchasing tax stamps. The liability is relocated to ***new subsection 221G(2D)***.

Clause 7 : will insert ***new subsection 221P(1A)*** into the Principal Act to ensure the Commissioner's priority will not apply to amounts deducted under Division 2 of Part VI which become payable after 30 June 1993.

Clause 8 : inserts four new subsections into section 221R in Division 2 of the Principal Act. The first subsection extends the meaning of amounts payable under Division 2

to include amounts and penalties in respect of unpaid estimates under new Division 8 and penalties payable in relation to those amounts under new Division 9. The second subsection covers the application of those amounts when recovered and the third subsection deals with statements in recovery proceedings. The fourth ensures the new terms referred to in Division 2 have the meaning given to those terms in New Division 8.

Clauses 9 and 10 : are comparable to ***clauses 7 and 8*** and relate to deductions under Division 3A of Part VI.

Clauses 11 and 12 :are comparable to ***clauses 7 and 8*** and relate to deductions under Division 3B of Part VI

Clauses 13 :preserves the current operation of the priority provision in subsection 221YHZD(3) in Division 3B in respect of TFN withholding tax payable before 1 July 1993.

Clauses 14 and 15 :are comparable to ***clauses 7 and 8*** and relate to deductions under Division 4 of Part VI.

Clause 16: insert new Divisions 8, 9 and 10 into the Principal Act. The sections in the new Divisions are summarised below.

Division 8 - Prompt recovery, through estimates and payment agreements, of amounts not remitted under Divisions 2, 3A, 3B and 4.

Subdivision A - Object and Interpretation

Section 222AFA: explains the purpose of new Division 8 as enabling the Commissioner to take prompt and effective action to recover unremitted amounts. The action will be facilitated through the making of an estimate of the amounts deducted and commencing recovery proceedings based on the estimate.

Section 222AFB: introduces new terminology for the proposed arrangements whereby the Commissioner will be able to commence recovery proceedings based on an estimate.

Section 222AFC: explains the concepts of unpaid amount of a liability and unpaid amount of an estimate.

Subdivision B - Making, reducing and revoking estimates

Section 222AGA: describes the circumstances when the Commissioner may make an estimate of the unpaid amount of a liability as well as the basis for the estimate.

Section 222AGB: explains the details of the estimate notice which the Commissioner must send to the person or the person's trustee (if applicable), when the Commissioner makes an estimate. The estimate notice will invite the person liable to make a statutory declaration setting out the actual liability. Where a declaration is made, the estimated liability will be reduced to the actual amount.

Section 222AGC: explains that an estimate is to be reduced if the person liable, or the person's trustee, gives a statutory declaration to the effect that the actual amount is less than the estimate. The section also provides that the Commissioner can reduce an estimate at any time. Where the estimate is reduced for a reason other than the receipt of a statutory declaration, the Commissioner must notify the person liable of the underlying liability and the reduced amount of that liability.

Section 222AGD: is similar to *section 222AGC* and explains that an estimate is revoked if the person liable, or the person's trustee, gives a statutory declaration to the effect that no deductions were made.

Section 222AGE: details the matters for the Commissioner to consider when exercising a power under *sections 222AGC and 222AGD*.

Section 222AGF: details the requirements for statutory declarations made for proposed arrangements dealing with reducing and revoking estimates.

Section 222AGG: provides that only one estimate can be in force at any one time in relation to the same liability.

Subdivision C - Recovering unpaid amount of estimate

Section 222AHA: specifies that the liability to pay an estimate is separate and distinct, but parallel to the underlying liability and the judgment debt in respect of that amount. The section also explains that payment of one parallel liability will reduce other parallel liabilities to the same extent.

Section 222AHB: is necessary to address the situation where an amount paid to discharge an estimate of an underlying liability exceeds that liability. The section provides for the excess to be used to discharge other existing liabilities and any balance remaining to be refunded.

Section 222AHC : details the available defences in recovery proceedings. The section entitles the person liable (or trustee if appropriate) to file an affidavit to verify facts sufficient to prove the actual amount of underlying liability.

Section 222AHD : states the effect of an affidavit on an estimate when there are sufficient facts to prove that the underlying liability never existed or has been discharged in full.

Section 222AHE : specifies the requirements for an affidavit under **section 222AHC** to be used as a defence in recovery proceedings.

Subdivision D - Insolvency Proceedings

Section 222AIA : states that a statutory demand issued on an estimate basis is changed accordingly, or set aside, if the estimate is later reduced or revoked respectively.

Section 222AIB : ensures that failure to comply with a statutory demand based on an estimate would not be evidence of insolvency if the underlying liability is less than \$2,000.

Section 222AIC : states that the estimate would be reduced by the excess if the unpaid amount of an estimate is more than the sworn amount of liability under **section 222AIB**.

Section 222AID : specifies the requirements for an affidavit under **section 222AIB** in terms of time, facts to verify, and who it must be sworn by.

Section 222AIE : states the grounds on which a statutory demand is not to be set aside or varied by a court in recovery proceedings.

Section 222AIF : provides for an estimate to be admitted as proof in a bankruptcy or winding up.

Section 222AIG: enables a trustee, who controls the property of a person liable for an estimate of unpaid liability, to reject the proof of the liability on the grounds that the liability never existed or has been discharged in full.

Section 222AIH : sets out the requirements for a statutory declaration for the purposes of **section 222AIG**.

Section 222AII : specifies that **Subdivision D** has effect regardless of any provision of the Corporations Law of a State or Territory.

Subdivision E - Penalty for late payment of estimate

Section 222AJA : imposes a late payment penalty when the amount of estimate remains undischarged after 7 days from when the Commissioner sends the notice of estimate to the person liable.

Section 222AJB : provides that the penalties for the estimated and underlying liabilities are parallel liabilities.

Section 222AJC : provides the Commissioner with powers to remit the late payment penalties.

Subdivision F - Effect on liabilities under this Division and other Divisions if estimate reduced or revoked

Section 222AKA : states that a reduced amount of estimate and an estimate that has been revoked are taken to have effect as if the original amount of the estimate had been the reduced estimate or never been made.

Section 222AKB: provides that an estimate being reduced or revoked will not affect the Commissioner's right in relation to the underlying liability.

Subdivision G - Payment agreements

Section 222ALA: enables the Commissioner to agree to accept payment of a liability over a period of time by instalments.

Section 222ALB: enables the Commissioner to apply the payments under an agreement in whatever way he or she thinks appropriate.

Subdivision H - Miscellaneous

Section 222AMA: provides that the liability for an unpaid amount of estimate or underlying liability remain payable despite judgment being entered by court.

Section 222AMB: provides that estimate notices given to persons liable for unremitted amounts are to be given to a person's trustee by the person when the person's property has become vested in, or the control of the person's property has passed to, the trustee.

Division 9 - Penalties for directors of non-remitting companies

Subdivision A - Object and Interpretation

Section 222ANA: explains the purpose of Division 9 as being to ensure that a company either meets its obligations under Division 2, 3A, 3B, 4 or 8, or goes promptly into voluntary administration under Part 5.3A of the Corporations Law or into liquidation.

Section 222ANB: introduces the new terminology used in Division 9.

Subdivision B - Company failing to remit under Division 2, 3A, 3B or 4

Section 222AOA: specifies that the provisions will apply to a company incorporated under the Corporations Law.

Section 222AOB: details what directors of company must do in the period from when deductions have been made until the date those deductions are due to be paid to the Commissioner.

Section 222AOC: imposes a liability on directors for an amount equal to the company's unremitted deductions if the requirements of **section 222AOB** are not met.

Section 222AOD: imposes a liability on new directors if the requirements of **section 222AOB** are not complied with within 14 days of becoming a director.

Section 222AOE: provides that the Commissioner is not entitled to recover a penalty until 14 days after giving notice to the person liable. The section also describes the information to be contained in the notice and explains what has to be done for the penalty to be remitted.

Section 222AOF: provides that the notice to the directors is to be sent to the director's address as notified to the Australian Securities Commission.

Section 222AOG: remits the penalty imposed on directors if they meet the stipulated requirements.

Section 222AOH: states that a penalty for which a director is liable is a parallel liability to penalties imposed on other directors and the company's liability. The section explains the treatment of a parallel liability when a payment is made.

Section 222AOI: provides that a director is entitled to be indemnified by the company or anyone else for any payments he or she makes by way of penalty under these provisions.

Section 222AOJ: details defences available to directors when the Commissioner seeks to recover the penalty from a director.

Subdivision C - Company failing to pay estimate under Division 8

Section 222APA: specifies that the provisions will apply to a company incorporated under the Corporations Law.

Sections 222APB to 222API: are similar provisions to **sections 222AOB to 222AOJ** except that they relate to directors who fail to ensure their company pays the estimated liability.

Subdivision D - Company contravening payment agreements under Division 8

Section 222AQA: requires the directors to ensure the company complies with the terms of any payment agreement.

Section 222AQB: explains the effects on parallel liabilities of a director making a payment under an agreement.

Section 222AQC: provides a director is entitled to be indemnified by the company or anyone else for any payments he or she makes under the payment agreements.

Section 222AQD: describes the defences available to a director in recovery proceedings when an agreement has been contravened.

Division 10 - Miscellaneous

Section 222ARA: specifies that Part VI as amended is not intended to limit or exclude the operation of Chapter 5 of the Corporations Law.

Clause 17: contains the application provisions for certain amendments.

Administrative Decision (Judicial Review) Act 1977

Clause 18: defines "Principal Act" as being the Administrative Decisions (Judicial Review) Act 1977.

Clause 19: inserts into Schedule 1 of the Principal Act a paragraph to describe the decisions of the Commissioner which are not reviewable.

Corporations Law

Clause 20: defines "Corporations Law" to mean the Corporations Law set out in section 82 of the *Corporations Act 1989*.

Clause 21: inserts *new section 443BA* to provide that an administrator will be personally liable for amounts of tax due under a remittance provision during the period of administration.

Clause 22: amends section 443C by omitting "section 443A or 443B" and substituting "this subdivision".

Clause 23: amends section 443D by omitting "section 443A or 443B" and substituting "Subdivision A or a remittance provision as defined in subsection 443BA(3)".

Clause 24: amends section 459E to enable the Commissioner to serve a demand based on estimates of the liabilities under the remittance provisions.

Clause 25: inserts *new section 588F* which expressly provides that the liabilities of a company under a remittance provision will be debts.

Clause 26: amends section 588FG to deem tax debts to be for valuable consideration to enable the Commissioner to avail of the defence in the voidable transactions provisions.

Clause 27: inserts *new section 588FGA and 588FGB*. New section 588FGA enables the Commissioner to be indemnified by the directors if any tax debts are declared void by the court. New section 588FGB provides defences for directors who may be required to indemnify the Commissioner.

Clause 28: amends section 588Y to exclude debts due to the Commissioner under the remittance provisions from the application of subsection 588Y(2).

Consequential Amendments of other Acts

Clause 29 : contains consequential amendments to other Acts resulting from the removal of the Commissioner's priority. The amendments to these Acts are set out in the *Schedule* of this amending Act.

Clause 30 : is a transitional provision relating to the amendments to section 122 of the Bankruptcy Act. It provides that section 122 applies on or after the date the Act gets Royal Assent, even if the tax became payable before that day; and despite the repeal of subsection 123(5). The subsection continues to apply in relation to a deduction to which section 221P of the Assessment Act applies.

PART A

INCOME TAX ASSESSMENT ACT 1936



Chapter 1

Removal of Commissioner's priority

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Summary of proposed amendments

Purpose of amendment: To remove the Commissioner's priority in respect of debts for certain unremitted amounts. Those debts currently have priority over all other debts of a person or company in a bankruptcy or an insolvency, irrespective of whether the other debts are preferential, secured or unsecured.

Date of Effect: The amendments will apply to unremitted amounts which become payable after 30 June 1993.

Background to the legislation

Sections 221P, 221YHJ, 221YHZD and 221YU of the *Income Tax Assessment Act 1936* (Assessment Act) currently give the Commissioner priority over all other creditors (whether preferential, secured or unsecured) of a person, including a company, in the recovery of certain unremitted amounts when the person becomes a bankrupt or when a company is placed into liquidation or receivership.

The main debts are those which arise when

- tax instalment deductions, made from salary or wages under the pay as you earn (PAYE) arrangements; or
- deductions, made from prescribed payments under the prescribed payments system (PPS);

are not remitted to the Commissioner in accordance with the Assessment Act.

The Commissioner also has priority for debts which arise when deductions from natural resource payments, unattributed income and deductions of withholding tax are not remitted.

The priority does not extend to properly incurred costs and charges of a trustee in bankruptcy or a liquidator. These costs include expenses incurred by a trustee or a liquidator (including fees) and the costs of the application for bankruptcy or winding up.

The Commissioner's priority for unremitted amounts is covered by the following provisions in the Assessment Act:

Unremitted amounts	Subsections
PAYE	221P(1), (2) & (3)
PPS	221YHJ(3), (4) & (5)
Natural resource & other unattributed income payments	221YHZD(3), (4) & (5)
Withholding tax	221YU(1), (2) & (3)

In their joint Press Release on 2 December 1992, the Treasurer and the Attorney-General announced that the Commissioner's priority was to be abolished.

As a result of the amendments proposed, debts due to the Commissioner, arising as a result of a failure to remit amounts deducted, will be treated in a similar manner to debts payable to other unsecured creditors.

Explanation of proposed amendments

Application of the removal of the Commissioner's priority

Clause 7 provides that the amendments to remove the Commissioner's priority will apply to debts for unremitted amounts which become payable after 30 June 1993 [*New subsection 221P(1A)*].

Will the Commissioner's priority continue to apply?

Yes. The Commissioner's priority will continue in respect of unremitted amounts which become payable before 1 July 1993.

Current framework for the Commissioner's priority

The sections in the Assessment Act which enable the priority to operate are summarised in the above table. The purpose of those provisions is twofold.

First, the provisions [subsections 221P(1), 221YHJ(3), 221YHZD(3) and 221YU(1)] operate to transfer the liability for the unremitted amounts to a trustee in specific situations. Those situations are where all of the property of the person who deducted the amounts becomes vested in, or the control of that person's property passes to, a trustee. This would occur when a company becomes insolvent and is placed in liquidation.

Second, the remaining priority provisions [subsections 221P(2) & (3), 221YHJ(4) & (5), 221YHZD(4) & (5), and 221YU(2) & (3)] have the effect of giving the debts for the unremitted amounts priority over other debts payable by the trustee. As the Commissioner's priority is being removed, the priority provisions will have no application in respect of unremitted amounts which become payable after 30 June 1993 [*Clauses 7, 9, 11 and 15*].

Application to amounts which become payable after 30 June 1993 is achieved through a reference to specific deductions made. For example, to achieve the correct application for PAYE unremitted amounts, it is necessary to refer to deductions made after 14 June 1993 for early remitting group employers and deductions made after 31 May 1993 for other employers [*Clause 7*].

Tax stamps

Section 221P(1) also makes employers liable when they fail to remit deductions under section 221F or purchase tax stamps as required under section 221G. The liability for employers when deductions are not remitted also arises through the application of section 221F.

However, with section 221P(1) having no application for amounts payable after 30 June 1993, the liability on employers for failing or refusing to purchase tax stamps has been relocated from subsection 221P(1) to *new subsection 221G(2D)* [*Clause 6*].

Liquidators, receivers and certain agents

Section 215 of the Assessment Act places requirements on trustees (as defined in subsection 215(1)) after their appointment. For example, subsection 215(1) requires the trustee to notify the Commissioner within 14 days of appointment. The Commissioner then notifies the trustee of the amount of tax which is payable and will become payable.

Tax for section 215 purposes does not currently extend to unremitted amounts. This situation is consistent with the existence of a priority in respect of those amounts. With the priority being removed, *Clause 4* will amend section 215 to make it clear that "tax" for section 215 purposes will include the unpaid amount of a liability under a remittance provision or the unpaid amount of an estimate together with any late payment penalties in respect of those amounts. The new unpaid amounts are explained in *new section 222AFC*.

Clause 5 amends section 218 in a similar manner to the amendments to section 215. Section 218 currently enables the Commissioner to require a person who holds money in respect of another person to pay him, out of the money held, an amount sufficient to cover the tax due by the other person.

The amendment proposed in **clause 5** will extend the term "tax" in section 218 to cover unremitted amounts not currently included as well as the unpaid amounts and associated penalties referred to above. The term "taxpayer" in section 218 will also be extended to include a person liable to pay amounts to the Commissioner under Divisions 3B and 4 and new Divisions 8 and 9.

Consequential amendments to other Acts

To ensure the Commissioner's priority for unremitted amounts operates with other debts which also rank above unsecured creditors, the priority provisions in the Assessment Act are referred to in other Commonwealth Acts.

The Acts affected are the *Bankruptcy Act 1966*, the *Child Support (Registration and Collection) Act 1988*, the *Crimes (Taxation Offences) Act 1980*, the *Crown Debts (Priority) Act 1981*, and the *Life Insurance Policy Holders' Protection Levies Collection Act 1991*.

The *Schedule [Clause 29]* to this amending Act proposes to amend those Acts to remove the priority references in respect of unremitted amounts which become payable after 30 June 1993.

Chapter 2

Estimation of unremitted amounts

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Summary of proposed amendments

Purpose of amendment: To allow the Commissioner to estimate the unremitted amounts which become payable after 30 June 1993 and to commence recovery action on the basis of that estimate.

Date of Effect: The amendments in this part will apply to unremitted amounts which become payable after 30 June 1993.

Background to the legislation

The Commissioner is currently required to establish the precise amount of the unremitted amount before he can take any legal action to recover the amount. This often frustrates the efficient and timely recovery of the unremitted deductions because of the necessary delay between non-remittance and ascertainment of the unpaid amount.

While the priority currently enables the recovery of unremitted amounts in an insolvency (either in the bankruptcy of an individual or in the winding up of a company), it does not assist the Commissioner to recover in his day to day dealings with employers and payers who do not remit amounts deducted.

The amendments proposed in the Bill seek to overcome the difficulties created by the need to establish the precise

amount of the debt by introducing a new recovery regime. The features of the new regime parallel those for recovery arrangements in other countries such as the United Kingdom where an estimate of an unremitted amount is made and recovery action commences on the basis of that estimate.

A key feature of the new regime will enable the Commissioner to make an estimate of unremitted amounts when the time for payment has passed. He can then take action to recover that estimate if he is not advised of the actual amount. As the Commissioner is only interested in collecting the **actual** unremitted amounts, a person will be given an opportunity to inform the Commissioner of the actual amounts deducted.

Explanation of proposed amendments

The amendments proposed in new Division 8 are to be inserted into Part VI of the Assessment Act. They enable the Commissioner to take prompt and effective action to recover amounts not remitted as required under Divisions 2, 3A, 3B and 4 of Part VI [*New section 222AFA*].

Terms used in explanation

New section 222AFB explains the new terms to be introduced in new Division 8. Some of the terms are described below:

"Person" includes:

- a) an employer for PAYE purposes as defined in subsection 221A(1) of the Assessment Act; and
- b) a person as that term is defined for the PPS arrangements in subsection 221YHA(1) of the Assessment Act; and
- c) an investment body as defined in section 202D of the Assessment Act; and

- d) a person who is taken to be the investment body in relation to an investment because of subsection 221 YHZA(4) of the Assessment Act; and
- e) a company within the meaning of Division 4 of the Assessment Act in relation to distributions by a liquidator (see for example subsection 221 YK(2)); and
- f) & g) a government body and a partnership.

"Statutory demand" and "Statutory minimum" have the same meaning as in the Corporations Law.

"Trustee" means a trustee (as defined in section 6 of the Assessment Act) in whom a person's property is vested, or who has control of that person's property. Where the person is a partnership, the term trustee extends to a trustee of any of the partners.

"Underlying liability" in relation to an estimate is the actual liability to which an estimate relates.

New section 222AFC explains the meaning of the new terms unpaid amount of a liability and unpaid amount of an estimate. The terms reflect the extent to which the liabilities (based on either actual or estimated deductions) remain undischarged.

When the Commissioner may make an estimate

Under the amendments proposed, where the Commissioner has reason to suspect that a person has not remitted amounts deducted from payments made during a period, he may make an estimate of that person's liability without ascertaining the actual amount deducted [*New subsection 222AGA(1)*]. The Commissioner may then commence recovery action on the basis of that estimate .

Basis for the Commissioner's estimate

In making the estimate, the Commissioner will have regard to any relevant information which is available [*New subsection 222AGA(2)*]. Such information would include, for example, in the case of unremitted PAYE or PPS amounts, the employer's [subsection 221A(1)] or eligible

paying authority's [subsection 221YHA(4)], records of past deductions.

Notice to person liable

When the Commissioner makes an estimate of an unremitted amount, he must send a written notice of the estimate to the person who made the deduction and failed to remit that amount. It is envisaged that the notice could contain more than one estimate where, for example, there are unremitted PAYE or PPS deductions in respect of more than one period. The notice will also state that the estimate of the unremitted amount is due and payable immediately [*New section 222AGB*].

Can the estimate of the unremitted amount be reduced or revoked?

The Commissioner's notice will also advise that the estimate

- will be reduced if the person provides a statutory declaration specifying the amount of the underlying liability and the unpaid amount of the underlying liability [*New paragraph 222AGB(2)(e) and sections 222AGC and 222AGF*]; or
- will be revoked if the payer declares that no deductions were made in the period or periods covered in the notice [*New paragraph 222AGB(2)(e) and section 222AGD*].

For a reduction or revocation to occur, the statutory declaration must be a statutory declaration made under the *Statutory Declarations Act 1959* and must be given to the Commissioner within 7 days (or such longer period allowed by the Commissioner) after the Commissioner sends notice of the estimate to the person [*New section 222AGF*].

The Commissioner may reduce or revoke an estimate at any time, but is not obliged to consider whether or not to do so [*New subsections 222AGC(2) & 222AGD(2)*]. *New paragraphs 222AGE (a) to (d)* specify the matters to be considered by the Commissioner in reducing or revoking an estimate. For example, the fact that the estimate is of the unpaid amount of a liability and the purpose of the

reduction is to bring the estimated amount closer to the actual unpaid amount are two factors to be taken into account. Also, any reductions in the unpaid amount which occurred after the estimate was made would also be relevant.

Where the Commissioner reduces or revokes the estimate for any reason other than as a result of the receipt of a statutory declaration, he will be required to notify the person liable that:

- he has reduced the estimate and advise the reduced amount of the estimate; or
- the estimate has been revoked.

The reduction or revocation takes effect when the notice is sent [*New subsections 222AGC(3) and 222AGD(3)*].

Who can make a statutory declaration?

Proposed *new section 222AGF* also outlines the requirements for a statutory declaration including the form of the declaration and who is to make the declaration. The declaration will specify information such as the unpaid amount of liability to which the estimate relates, the deductions made during the period in question and how much of those deductions were paid to the Commissioner [*New subsections 222AGF(4) to (6)*].

New subsection 222AGF(7) provides that the declaration must be made by:

- a) if the person is a company that has directors, a secretary or both - a director or the secretary; or
- b) if the person is an individual - the person; or
- c) if the person is a government body - a prescribed person; or
- d) if the person consists of two or more persons including one or more individuals and is neither a company nor a government body (for example, a partnership) - that individual or one of those individuals; or

e) in any case - the person's trustee.

Decisions about estimates not reviewable

The Bill also proposes that the Commissioner's decision:

- about whether to make, reduce or revoke an estimate; and
- to determine the amount of an estimate or reduced amount of an estimate;

will not be reviewable under the *Administrative Decisions (Judicial Review) Act 1977 (the ADJR Act) [Part 3 of the Bill]*.

The reason why these decisions will not be reviewable is that a person who becomes liable to an estimate has the absolute right to vary the amount of the estimate by completing a statutory declaration.

This proposed amendment will be achieved by including the Commissioner's decision

- about whether to make, reduce or revoke an estimate; and
- to determine the amount of an estimate or reduced amount of an estimate

in Schedule 1 of the ADJR Act.

Can the Commissioner make more than one estimate in respect of the same liability?

The Commissioner cannot make a new estimate in relation to the same liability while an estimate is in force. An estimate is in force if the Commissioner has given notice of it to a person and the estimate has not been revoked and the person's liability to pay the estimate has not been discharged [*New section 222AGG*].

Nature of the liability created by notice

The liability to pay an estimate will be separate and distinct from the underlying liability. To avoid a "double recovery" situation, of both the underlying liability and the estimate, the amendments provide that the underlying liability and the estimated liability are "parallel liabilities". When one liability is discharged in part or in full, the other liability will be discharged to the same extent [*New section 222AHA*].

Also, the operation of *new section 222AHA(1)* will make the liability for the estimate due and payable immediately. This is consistent with the fact that the actual liability to which the estimate relates (the underlying liability) would have been due and payable on a date prior to the estimate being notified.

What happens when the estimate is too low or too high?

In practice it will be most unusual for the Commissioner to estimate precisely the actual unremitted amounts. Of course the estimate could be reduced to the actual unremitted amount when the person liable, upon being notified of the estimate by the Commissioner, declares what the actual unremitted amount was. The operation of *new section 222AGC* will then result in the actual amount being recovered as at present.

However, adjustments, either in favour of the Commissioner or the person liable, will be required when:

- after notification of the estimate, no statutory declaration setting out the actual unremitted amount is received; and
- the Commissioner recovers the estimated liability from the person liable, either directly or through court proceedings; and
- it is proved that the actual unremitted amount was different to the estimated liability.

The prime objective of the amendments involving the estimation of unremitted amounts is to enable the Commissioner to recover the **actual** amount which was deducted and not remitted. Accordingly, the proposed amendments contain provisions which will allow for adjustments to be made to the estimate which will facilitate collection of the actual amount.

New section 222AHB provides that when the estimated liability is paid and it is found to exceed the unpaid amount of the actual liability, the Commissioner must refund the excess or apply it against any other liabilities of the person to the Commonwealth under laws administered by the Commissioner and then refund any excess.

On the other hand if the estimated liability is paid and is found to be less than the unpaid amount of the actual liability, the Commissioner will be able to take recovery proceedings to recover the balance of the actual liability.

If there is more than one estimate not paid, in the case of PAYE deductions, and a person pays an amount that does not equal the total of the outstanding estimates, the Commissioner will be able to apply the payment to discharge any estimate he thinks appropriate, irrespective of any direction from the person making the payment about how the payment should be allocated [**New subsection 221R(1B)**]. **New subsection 221YHN(1A)** which is inserted by **Clause 10**, provides comparable recovery arrangements for estimates and penalties in relation to PPS deductions under the Prescribed Payments System (PPS).

Will a person have the right to defend proceedings brought by the Commissioner to recover an estimate on the basis that the Commissioner's estimate is higher than the actual liability?

Yes, **new section 222AHC** provides that the Commissioner is not entitled to recover if the defendant proves by affidavit that:

- a) the underlying liability never existed; or

- b) the underlying liability has been discharged; or
- c) the underlying liability is less than the estimate.

In the case of (c), the Commissioner will be entitled to judgment only for the unpaid amount of the underlying liability.

New section 222AHE stipulates that the affidavit must be filed with the court by the person liable. A copy must also be served on the Commissioner within 14 days of the person taking a procedural step, for example, entering an appearance, as a party to the proceedings (if the Court does not extend this time). The section also sets out what facts the affidavit must verify and who can swear the affidavit (the same persons who can make a statutory declaration).

Insolvency proceedings

What is the effect of a statutory demand served on a company when the estimate the Commissioner is seeking to recover is either reduced or revoked?

If the Commissioner chooses to recover an estimate by serving a statutory demand on a company and the estimate is subsequently reduced or revoked, ***new section 222AIA*** has the effect of either:

- changing the statutory demand to reflect the reduced amount of the estimate (in this event, the changed statutory demand will have the same effect as if it had originally specified the reduced amount); or
- setting aside the statutory demand (when the estimate is revoked).

If an estimate has been reduced to an amount below the statutory minimum, can a court still order the winding-up of a company?

New section 222AIB provides that a court is not to presume that a company is insolvent simply because it has not paid the amount/s of an estimate/s if the underlying liability/ies is below the statutory minimum of \$2,000.

In winding up proceedings, where an estimate is shown to exceed the underlying liability by an affidavit, the amount of the estimate is to be reduced by the excess [**New section 222AIC**]. Further, proposed **new section 222AID** contains the requirements necessary for an affidavit for the purposes of a defence on a winding up application under **new section 222AIB**.

Is the amount of an estimate provable in bankruptcy or winding up?

Yes, unless the liability to which the estimate relates has already been admitted to proof and the proof has not been set aside. However, the Commissioner can prove for that part of the underlying liability that exceeds the amount of the estimate that has been admitted to proof [**New section 222AIF**].

New section 222AIG allows the trustee to reject, in full or in part, a proof of debt based on an estimate of liability if he or she files a statutory declaration in a court that has jurisdiction over the trustee's administration. The declaration must prove that the underlying liability never existed or has been paid or is less than the estimated liability.

The Commissioner can apply to that court to have the trustee's decision reversed. If the Commissioner does not apply to the court, or does apply, but the court does not reverse the decision, the estimate is either revoked or reduced.

New section 222AIH sets out the requirement for a statutory declaration to be used by a trustee in support of this rejection of a proof of debt based on an estimate.

Do these provisions conflict with the Corporations Law?

New section 222AII makes it clear that **Subdivision D** will prevail if there is any conflict between them and the Corporations Law provisions.

Penalty for late payment of estimate

A late payment penalty regime, similar to that for late payment of PAYE deductions in subsection 221F(12) and other unremitted amounts, is proposed where an estimate remains undischarged at the end of 7 days after the Commissioner sends the notice of estimate to the person liable [*New section 222AJA*].

How is the late payment penalty calculated?

The late payment penalty will be calculated from the due date of the underlying liability referred to in *new paragraph 222AGA(1)(b)*. That is the date on which the unremitted amounts, on which the estimated liability was based, were payable to the Commissioner.

As with late payment of PAYE deductions, the penalty amounts for a non government body will be a flat penalty equal to 20% of the unpaid amount of the estimate plus 16% per annum on the unpaid amount of the estimate and on the unpaid amount of the flat penalty [*New subsection 222AJA(3)*].

Nature of penalty and consequences of payment

Running parallel with this late payment penalty would be a penalty for the underlying liability, i.e., the actual amounts deducted and not remitted. *New section 222AJB* provides that the penalties for the estimated and underlying liabilities are parallel liabilities in the same way as the estimate and underlying liability are parallel liabilities in *new section 222AHA*.

Can the late payment penalty be remitted?

Yes, the amendments provide the Commissioner with similar powers to remit penalties as are currently available under the remittance provisions [*New section 222AJC*].

Recovery of late payment penalty

New subsection 221R(1B), in the case of late payment of PAYE deductions, provides the mechanism for the Commissioner to recover the late payment penalty in

respect of an estimate. For example, *new section 222AJA* in conjunction with other relevant provisions (see for example section 221R) in the other Divisions in Part VI will result in the penalty being a debt due to the Commonwealth and payable to the Commissioner. The section also enables the Commissioner, on recovering a penalty, to apply the amount (the debt payment) in respect of the debt in question or other debts arising from liabilities under other remittance provisions.

What is the effect on liabilities under Division 8 and other Divisions if an estimate is reduced or revoked?

New section 222AKA provides that the liabilities are to be adjusted with effect from when they arose. For example, if a late payment penalty was calculated under *new section 222AJA* in respect of an estimate and that estimate was subsequently reduced by the Commissioner, the penalty so calculated would be adjusted as if the original estimate had not been made. Any penalty will still be calculated from the due date of the underlying liability.

The new section also covers the situation where the reduction or revocation occurs after the penalty, as calculated on the original estimate, is paid. In this situation, the Commissioner must refund any excess amounts recovered or apply that excess against any liability of the person to the Commonwealth and refund so much as is not so applied.

What is the effect of a reduction or revocation on the Commissioner's rights in relation to the underlying liability?

To enable recovery of the actual amount deducted, *new section 222AKB* provides that an estimate being reduced or revoked will not prejudice the Commissioner's rights in relation to the actual underlying liability.

Chapter 3

Penalty for directors in respect of unremitted amounts

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Summary of proposed amendments

Purpose of amendment: To make company directors liable for deductions which are made by their company and not remitted to the Commissioner as required by the legislation.

Date of Effect: The amendment will apply to deductions which become payable after 30 June 1993 as the Commissioner's priority will no longer apply to those amounts.

Background to the legislation

Under the current law, the combined operation of section 8Y of the *Taxation Administration Act 1953* and section 21B of the *Crimes Act 1914* can result in company directors being convicted in relation to their company's non payment of amounts deducted. As mentioned in Chapter 1, the main deductions involved are those under the PAYE and PPS arrangements.

If convicted, company directors can be ordered by a court to pay reparation equal to the amount of the deductions

The joint Ministers' announcement of 2 December 1992 noted that the Commissioner's priority only operates when a business is put into some form of insolvency administration. As a result, the current operation of the priority puts no pressure on the persons liable to pay unremitted amounts when due. If company directors were made liable for unremitted amounts, which are currently subject to the priority, solvency problems would be confronted earlier and the escalation of debts in respect of those amounts could be prevented.

The proposed amendments will allow the Commissioner to take more effective recovery action for unremitted amounts and will remove the need to have a conviction as a prerequisite to recovery. This result will be consistent with the approach taken in several areas of directors' liability in the Corporations Law as amended by the *Corporate Law Reform Act 1992*.

Explanation of proposed amendments

Purpose of amendments:

Under the proposed amendments, it will no longer be necessary for directors to be convicted of failing to pay unremitted amounts before they become personally liable to pay those amounts.

The amendments proposed in new Division 9 of the Assessment Act will ensure that a company either meets its obligations under Division 2, 3A, 3B, 4 or 8, or goes into voluntary administration under Part 5.3A of the Corporations Law or into liquidation.

The Division imposes a duty on the directors to cause the company to do so. The duty is enforced by penalties equal to the unremitted amounts. However, a penalty can be recovered only if the Commissioner gives written notice to the person concerned. The penalty is automatically remitted if the company meets its obligations, or goes into voluntary administration or liquidation, within 14 days after the notice is given.

As explained in the outline to the amendments [*New sections 222ANA and 222ANB*], directors will be liable for unremitted amounts (or an estimate thereof) when certain options to extinguish or avoid that liability are not taken. The options include:

- the liability for the unremitted amount being discharged;
- an administrator being appointed; or
- the company beginning to be wound up.

However, before the Commissioner can recover an unremitted amount (or estimate thereof) by way of penalty from directors, the Commissioner must notify the directors of their liability for the penalty. The directors will then have a further 14 days after being notified to have the penalty remitted. The penalty will be remitted if, at the end of the 14 days, one of the options referred to above is taken.

Framework of the provisions

The amendments explained in this Part of the Explanatory Memorandum are divided into the following three Subdivisions contained in the Bill:

- | | |
|----------------------|--|
| <i>Subdivision B</i> | Company failing to remit under Division 2, 3A, 3B or 4 |
| <i>Subdivision C</i> | Company failing to pay estimate under <i>Division 8</i> |
| <i>Subdivision D</i> | Company contravening payment agreement under <i>Division 8</i> |

Subdivision B [New sections 222AOA to 222AOJ] contains the consequences for a director who fails to ensure that a company under his or her directorship which makes deductions:

- remits those deductions to the Commissioner; or

makes an agreement with the Commissioner to remit the deductions; or

- goes into voluntary administration; or
- goes into liquidation

before the due date for payment of those deductions.

Subdivision C [New sections 222APA to 222API] is similar in operation to **Subdivision B** except that it deals with the situation where a director fails to ensure the company exercises at least one of the above options when the company has become liable to pay an estimate of the deduction made.

Onus on directors to ensure payment arrangements are complied with

Subdivision D [New sections 222AQA to 222AQD] contains the consequences for directors when a company contravenes a payment agreement. The provisions enabling the Commissioner to enter into an agreement with a person liable are contained in **new section 222ALA**.

An explanation of **new section 222ALA** is contained at the conclusion to this Part.

Company failing to remit under Division 2, 3A, 3B or 4

Application of the provisions

The proposed amendments to penalise directors for unremitted amounts (or an estimate thereof) will operate only when a company, under their directorship, becomes liable to pay to the Commissioner an unremitted amount in respect of a deduction made and that liability remains unpaid. The amendments will apply to deductions which become payable after 30 June 1993 and to companies incorporated under the Corporations Law [**new section 222AOA**].

Directors will be able to avoid being penalised if any one of four options is taken on or before the date on which the deductions made become due and payable to the Commissioner [*New section 222AOB*].

If none of the options are taken by the due date each person, who was a director during the period from when the company became liable to remit (i.e., when the deduction in question was made) until the due date, will be liable to pay to the Commissioner, by way of penalty, an amount equal to the unremitted amount [*New section 222AOC*]. As explained earlier, the unremitted amount or unpaid amount of a liability represents the deductions made by the company and not remitted to the Commissioner.

Can new directors be penalised?

Yes. If a new director is appointed after the due date for a particular unremitted amount, the new director will be liable for that amount if none of the options in *new section 222AOB* are taken within 14 days after the director's appointment [*New section 222AOD*]. As with existing directors, new directors will have a further 14 days, from the time they are notified by the Commissioner that they are liable, to have the penalty remitted.

How can directors avoid being penalised?

Directors will avoid being penalised under the new arrangements if *new section 222AOB* is complied with before the due date for the deductions made. Compliance will occur if:

the company pays the unremitted amount [*New paragraph 222AOB(2)(a)*]; or

the Commissioner and the company enter into a payment agreement under *new section 222ALA* to pay the unremitted amount [*New paragraph 222AOB(2)(b)*]; or

the company has an administrator appointed under sections 436A, 436B or 436C of the Corporations law [*New paragraph 222AOB(2)(c)*]; or

the company begins to be wound up within the meaning of the Corporations Law [*New paragraph 222AOB(2)(d)*].

New section 222AOB will be complied with even if the directors did not cause the event to happen. Where the section is not complied with by the due date, company directors will continue to be liable and under the obligations imposed by the new arrangements until compliance occurs [*New subsection 222AOB(3)*].

When will the Commissioner recover the penalty under new sections 222AOC or 222AOD?

The proposed amendments will require company directors to be fully informed as to when they are liable for the unpaid amount of a company's liability under a remittance provision in respect of deductions made. However, directors will not be penalised automatically when the compliance options described above are not taken.

Before the Commissioner can recover a penalty equal to an unremitted amount from a director, the Commissioner must individually give to the director a written notice stating the amount involved and allow the director another 14 days to avoid the imposition of the penalty [*New section 222AOE*].

When will the penalty be remitted?

New subparagraphs 222AOE(b)(i) to (iv) provide that the directors' penalty for unremitted amounts will be remitted if, at the end of 14 days after being notified:

- the unpaid liability in question is discharged [(i)]; or
- an agreement is in force to discharge the liability [(ii)];
or
- the company is under administration [(iii)]; or
- the company is being wound up [(iv)].

How will the notice be given?

The Commissioner's notice will be posted to the director's address as provided by the Australian Securities Commission in accordance with section 242 or 335 of the Corporations Law [*New section 222AOF*]. This section will ensure notices are sent to current addresses by requiring the Commissioner to send the notice to an address within 7 days of obtaining the address from the ASC.

What constitutes giving or sending a notice?

The amendments as explained in this Chapter and elsewhere [*New section 222AGB*] refer to the Commissioner giving or sending a notice. Section 29 of the *Acts Interpretation Act 1901* clarifies the meaning of the expressions 'serve', 'give' or 'send'. Those terms are effected when the notice is delivered in the ordinary course of post.

What if compliance occurs within the 14 days from when the Commissioner's notice is given to individual directors?

In this event, *new section 222AOG* will operate so that the penalty in respect of the unremitted amounts will be remitted for those directors who were able to comply with the notice under *new section 222AOE* or who were not notified under that section.

For example, if compliance resulted because an administrator was appointed before the Commissioner could notify the directors under *new section 222AOE*, then the Commissioner would be prevented from recovering the liability for unremitted amounts from the company's directors.

A director who receives a notice which is not complied with within 14 days will not have the penalty remitted even though compliance with a subsequent notice to another director occurs.

Director's and company's liability generally

A company's liability and the penalties for directors (under [*new sections 222AOC, 222AOD*]) for an unpaid amount

will be parallel liabilities. When an amount is paid to discharge one of the liabilities each of the other liabilities is discharged to extent of the same amount [***New section 222AOH***].

Director's rights of indemnity and contribution

New section 222AOI provides that a director is entitled to be indemnified by the company, or to obtain contribution from anyone else who the Commissioner could have sued, for payments he or she makes by way of penalty as a result of the company failing to remit amounts deducted.

Directors' defences in recovery proceedings

The proposed amendments contain defences for a director in recovery proceedings by the Commissioner for penalties payable under ***new sections 222AOC or 222AOD***. It will be a defence if it can be proved that, because of illness or some other reason, a director did not take part in the company's management when ***new section 222AOB*** had to be complied with [***New subsection 222AOJ(2)***].

It will also be a defence if a director can prove that she or he took all reasonable steps to ensure that the deductions made were paid to the Commissioner, or the company complied with one of the other requirements in ***new section 222AOB*** by the due date (or within 14 days of becoming a director in the case of new directors) or that there were no such steps that the director could take [***New subsection 222AOJ(3)***].

New subsection 222AOJ(4) clarifies what is meant by "reasonable" steps in defence proceedings. In addition to all relevant circumstances, consideration is to be given to when and how long the director took part in the management of the company.

Company failing to pay estimate under Division 8

The objective of the amendments contained in the Bill is to enable the Commissioner to recover unremitted amounts which are due and payable after 30 June 1993. The amendments explained above involve making directors liable for the actual unpaid liability or unremitted amount.

Chapter 2 explained the proposed amendments which will enable the Commissioner to recover, the unpaid amount of liability on the basis of an estimate. Consistent with those amendments and the amendments to recover the actual unpaid liability from directors, the new arrangements will also extend to recovering an estimate of the unpaid amount of liability from directors.

New sections 222APB to 222API, which propose penalties for directors equal to an estimate of the unremitted amount will operate in a manner similar to the provisions described above [*New sections 222AOB to 222AOJ*] which operate to recover the actual unremitted amount.

Directors will become liable for an estimate of the unremitted amount when certain options are not taken within 14 days after the Commissioner notifies the company of the estimate.

Why are similar provisions required for the actual and estimated liabilities?

The main reason is that particular features of an actual and estimated liability differ. For example, the point in time when a director becomes liable for the actual liability arises when the deduction that has been made is not remitted to the Commissioner as required under a remittance provision, or one of the other options available is not taken before the due date for paying the deduction [*New section 222AOB*].

A director will become liable for an estimate if, within 14 days of the company being notified of the estimate, the estimate is not paid or one of the options available is not taken [*New section 222APB*]. The company's liability for an estimate arises under *new section 222AGB* when the

Commissioner notifies the company of the estimate of the unpaid liability.

Another difference is the due dates the actual and estimated liabilities are payable to the Commissioner. For example, subsection 221F(5) provides when PAYE deductions are payable to the Commissioner. For early remitting companies, August deductions made after 14 August 1993 are payable to the Commissioner no later than 7 September 1993. *New section 222AGB* provides that the liability for an estimate is due and payable on the day on which the estimate notice is sent to a person.

For ease of explanation, the comparable provisions to penalise directors for either the actual or estimated liabilities are as follows:

Penalty for directors who fail to ensure their company:

<i>remits deductions made</i>	<i>pays the estimated amount</i>
222AOB	222APB
222AOC	222APC
222AOD	222APD
222AOE	222APE
222AOG	222APF
222AOH	222APG
222AOI	222APH
222AOJ	222API

As with the actual liability for an unpaid amount, the new arrangements to recover the estimate from directors provide that the Commissioner must give directors 14 days notice before recovering the penalty equal to the estimate [*New section 222APE*].

New section 222APE addresses the situations where the penalty notice is given to a director either within the 14 days after the Commissioner has given the company an

estimate notice for unremitted deductions [*New paragraph 222APE(1)(b)*] or more than 14 days after the notice has been given to the company [*New paragraph 222APE(1)(c)*].

In the first situation the penalty notice will state that unless the company's liability is discharged or one of the other options is taken within 14 days of the company receiving the notice of estimate, the director will become liable for a penalty equal to the unpaid amount. In the second situation, the penalty notice will state that the director is liable for the unremitted amount.

However, consistent with the arrangements for recovering the actual liability, the penalty notice will state the penalty will be remitted if the liability is discharged or one of the other options is taken within a further 14 days of the penalty notice being given [*New paragraph 222APE(1)(d)*].

Company contravening payment agreement under Division 8

New section 222ALA which is introduced in Division 8 provides that the Commissioner may agree to accept payment of either the actual unremitted amount(s) or the estimate(s) over a period of time. In practice, it is envisaged that the majority of payment agreements will be made to recover the actual amount deducted and not remitted.

Where the Commissioner agrees to accept payment of an unremitted amount over a period of time, he is not altering the date the original liability was due and payable. Additional tax for late payment will continue to apply from the date the original debt became due and payable (for example, from the seventh day of the month following the month in which PAYE deductions were made).

If the Commissioner enters into a payment agreement and payments are not made on the days specified in the agreement or other conditions in the agreement are not complied with, the person contravenes the agreement.

Where a specified amount is not paid on a specified day, the balance of the amounts payable under the agreement becomes a liability due and payable [*New subsection 222ALA(3)*].

[*New subsection 222ALA(7)*] makes it clear that the Commissioner is not obliged to enter into a payment agreement. His decision not to do so would be subject to judicial review under the ADJR Act.

Proposed *new sections 222AQA to 222AQD* provide a new penalty regime for those directors who are not liable for unremitted amounts or an estimate because of compliance with *new paragraphs 222AOB(1)(b) or 222APB(1)(b)*. This would occur, for example, when an agreement is made with the Commissioner under *new section 222ALA* to pay the company's liability for the unremitted amount or the estimate.

Where the Commissioner agrees to accept payment of the unremitted amount(s) from a company, the directors of the company must cause the company to comply with the agreement. If the company contravenes the agreement, the directors (when the agreement was made and new directors appointed before the contravention) will be liable to pay, by way of penalty, the balance payable under the agreement [*New section 222AQA*]. In this event, the Commissioner will be able to immediately recover the balance payable under the agreement from those directors.

Recovery provisions, such as *new subsection 221R(1A)*, in the case of PAYE deductions, would enable the Commissioner to apply the penalty recovered against one or more outstanding debts.

New sections 222AQB to 222AQD will operate in a similar manner to the comparable sections to those which impose a penalty on directors for the company's unremitted amount (in *Subdivision B*) or the estimate (in *Subdivision C*).

The sections provide for payment of the penalty or discharging the liability [*New section 222AQB*], directors rights of indemnity and contribution [*New section 222AQC*]

and for defences in recovery proceedings [*New section 222AQD*].

For example, in the case of a director being penalised because a company contravened a payment agreement, it will be a defence if the director can prove that:

- because of illness, he or she did not take part in the management of the company; or
- all reasonable steps were taken to ensure the company complied with the agreement [*New subsection 222AQD(2)*].

PART B

CORPORATIONS LAW

Chapter 4

Consequential amendments to the Corporations Law, the Bankruptcy Act 1966 and the Crown Debts (Priority) Act 1981.

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Summary of proposed amendments

Purpose of amendment: The proposed amendments to the Corporations Law are relatively minor and technical and support measures to be included in the Assessment Act. Broadly, they seek to put the Commissioner in the same position as other creditors, so that the Commissioner has clear access to all the remedies enjoyed by other creditors. Amendments to the *Bankruptcy Act 1966* (Bankruptcy Act), the *Crimes (Taxation Offences) Act 1980* and the *Crown Debts (Priority) Act 1981* are purely consequential.

Date of effect: The amendments will apply to unremitted tax amounts which become payable after 30 June 1993.

Background to the legislation

The proposed amendments to the Corporations Law are relatively minor and technical and support measures to be included in the Assessment Act. Broadly, they seek to put the Commissioner in the same position as other creditors, so that the Commissioner has clear access to all the remedies enjoyed by other creditors.

The abolition of the Commissioner's priority is essential for the smooth and efficient operation of the proposed voluntary scheme of administration under the new

insolvency provisions of the Corporations Law introduced by the *Corporate Law Reform Act 1992*. These provisions are due to commence in June this year.

Explanation of the proposed amendments

Definition of Corporations Law

Clause 20 defines "Corporations Law" to mean the Corporations Law set out in section 82 of the *Corporations Act 1989*.

Tax debts incurred during the voluntary administration moratorium to enjoy the same priority as other debts incurred during that period.

Under the voluntary administration procedure in Part 5.3A of the Corporations Law (introduced by the *Corporate Law Reform Bill 1992*), a moratorium will be imposed on recovery action by all creditors, including the Commissioner. However, for the period that the company is under administration the administrator will be personally liable for debts he or she incurs for services rendered, goods bought and property hired, leased, used or occupied. This period will usually last for 35 days but can be extended to 95 days under certain circumstances. The administrator will be indemnified for his or her liability out of the company's property. On any winding up of the company that indemnity will be afforded a very high priority, following only the expenses of preserving, realising or getting in the company's property and, in the case of a court ordered winding up, the costs of the application for the order.

To enable the Commissioner to enjoy the same high priority in relation to tax debts that is already accorded to debts for services rendered, goods bought and property hired, leased, used or occupied during the moratorium period, the proposed amendments [*new section 443BA - inserted by clause 21*] will provide that the administrator will also be personally liable (in relation to those amounts referable to the period of the administration) for amounts of tax due under a remittance provision .

Remittance provisions for the purposes of the section are sections 221F, 221G, and subsections 221YHDC(2), 221YHZD(1), 221YHZD(1A) and 221YN(1) of the Assessment Act [*new subsection 443BA(3)*].

Section 443C of the Corporations Law is amended by *Clause 22* by substituting the reference to *Subdivision A* for the reference to sections 443A and 443B.

In relation to tax debts incurred prior to the administration, the Commissioner is to be in the same position as other creditors, being able to vote on a deed of company arrangement and share rateably on any winding up [*section 443D as amended by Clause 23*].

Commissioner to make a statutory demand on the basis of an estimate

One of the difficulties presently experienced by the Commissioner in the recovery of tax debts is the necessity to ascertain exactly the amounts which are owing by a company before being in a position to issue a statutory demand (Division 2 of Part 5.4 of the Corporations Law introduced by the *Corporate Law Reform Bill 1992*).

To better equip the Commissioner to act quickly for the recovery of tax debts, the proposed amendments will enable the Commissioner to serve a demand on a company for the payment of the liabilities of the company under a remittance provision where the demand specifies the estimate of liability made by the Commissioner even if the liability arose prior to the commencement of the section [*new subsection 459E(5)*].

Remittance provisions for the purposes of the section are sections 221F, 221G, 221P and subsections 221YHDC(2), 221YHZD(1), 221YHZD(1A) and 221YN(1) and *new section 222AHA* of the Assessment Act.

Express provision for the Commissioner to take advantage of insolvent trading provisions in Part 5.7B to allow recovery from directors where tax debts are incurred while company is insolvent

In order to place the Commissioner in the same position as other creditors and to avail himself of the statutory provisions of the Corporations Law prohibiting insolvent trading and providing for voidable transactions, (Part 5.7B, introduced by the *Corporate Law Reform Act 1992*), the proposed amendments will expressly provide that the liabilities of a company under a remittance provision will be debts **[new section 588F- inserted by clause 25]**.

Remittance provisions for the purposes of the section are sections 221F, 221G, and subsections 221YHDC(2), 221YHZD(1), 221YHZD(1A) and 221YN(1) of the Assessment Act **[new subsection 588F(2)]**.

To deem tax debts to be for valuable consideration to enable the Commissioner to avail of the defence in the voidable transactions provisions

The voidable transactions provisions in Division 2 of Part 5.7B of the Corporations Law (introduced by the *Corporate Law reform Act 1992*) enable a liquidator to void dispositions of company property which may be characterised as unfair preferences, or as dispositions at an undervalue, and which occurred within a limited period prior to the winding up of the company. One of the elements of a successful defence to a recovery action by the liquidator in relation to such dispositions requires the disposition to have been made for valuable consideration. (Another element is that the person to whom the disposition is made was not aware of the insolvency of the person making the disposition **[see new sections 588FG and 588FGA]**).

To enable the Commissioner to avail of this defence, payments in respect of a person's tax liabilities are deemed always to be for valuable consideration **[new subsection 588FG(3)]**

The aim is to ensure that the Commissioner is in as near as possible the same legal position as other creditors who receive payments just before the insolvency of a debtor, so that the Commissioner is not put to potential challenge in respect of every such transaction.

Where the liability of a director is avoided through a preference payment by the company, the position of Commissioner will be made equivalent to a guaranteed creditor

As mentioned above, one of the elements of a successful defence to a recovery action by the liquidator in relation to such dispositions requires the disposition to have been made for valuable consideration. The risk remains, however, flowing from the Commissioner's possible possession of financial details of the company's health (through the receipt of tax information etc), that the Commissioner might still be precluded from asserting a defence under the voidable transactions provisions, on the basis that he or she was aware of the insolvency of the person making the disposition.

To ameliorate this result the proposed amendment provides that where a court order is made against the Commissioner (under section 588FF of the Corporations Law, introduced by the *Corporate Law Reform Bill 1992*) requiring the return of the money paid by the company to discharge its liability under a remittance provision, the directors of the company at the time when the payment was made shall indemnify the Commissioner for any loss or damage suffered by the Commissioner as a result [*new section 588FGA - inserted by clause 27*]. The amount recoverable by the Commissioner is a debt due to the Commonwealth and may be recovered in a court of competent jurisdiction by the Commissioner or Deputy Commissioner [*new subsection 588FGA(3)*].

Remittance provisions for the purposes of the section are sections 221F, 221G, 221P, subsections 221YHDC(2), 221YHZD(1), 221YHZD(1A) and 221YN(1) and *new section 222AHA* of the Assessment Act.

What rights does a director have under new section 588FGA?

Where a director is required to indemnify the Commissioner, that director has the same rights, whether by way of indemnity, subrogation or contribution against the company or any other person that he or she would have had, had the payment of the liability been jointly and severally guaranteed by those persons [*new subsection 588FGA(5)*].

What defences does a director have in relation to new section 588FGB?

New section 588FGB (inserted by clause 27) applies where a director or some other person becomes liable to pay the Commissioner under *new section 588FGA* or pay, by way of contribution, some other person who has a liability to the Commissioner under *new section 588FGA*. It is a defence if it is proved that at the time of the original payment to the Commissioner (and ordered to be returned) that the person believed on reasonable grounds that the company was solvent at that time and would remain so even on the making of that payment [*new subsection 588FGB(3)*]. For the purposes of this defence, a director may base a reasonable expectation on the advice of a reliable and competent subordinate or fellow director [*new subsection 588FGB(4)*].

Other defences provided for by *new section 588FGB* are that because of illness or for some other good reason the person did not take part in the management of the company at the time of the original payment [*new subsection 588FGB(5)*], or that the person took all available reasonable steps to prevent the company from making the payment [*new subsection 588FGB(6)*], including voting for the appointment of an administrator under Part 5.3A of the Corporations Law.

Application of compensation in relation to insolvent trading and voidable transactions

Section 588Y of the Corporations Law (introduced by the *Corporate Law Reform Bill 1992*) provides that where money is recovered by a liquidator under Part 5.7B of the Corporations Law, it is not available for distribution to those creditors who knew of the insolvency of the company at the time that the debt was incurred. Because this could operate unfairly against the Commissioner, as a result of the possible constructive knowledge of the sort referred to above, the proposed amendment will remove this limitation in relation to the Commissioner [*new subsection 588Y(4)*].

Amendments of the Bankruptcy Act, Crown Debts (Priority) Act 1981 and Crimes (Taxation Offences) Act 1980 as per the Schedule

Bankruptcy Act

removes the requirement from subsection 109(1) that the Trustee, in the making of payments to creditors, is subject to sections 221P and 221YU of the Assessment Act.

inserts after subsection 109(1), **new subsection 109(1A)** which makes section 109 (1) subject to the *Child Support (Registration and Collection) Act 1988*; and sections 221P and 221YU, and subsections 221YHJ(3),(4) and (5), and 221YHZD(3),(4) and (5) of the Assessment Act.

substitutes a **new paragraph 122(4)(b)** and **subsection 122(7)** and omits subsection 123(5).

- **New paragraph 122(4)(b)** has the effect of deeming payments of tax to the Commissioner to be for valuable consideration, and in the ordinary course of business and is analogous to the provisions of **new subsection 588FG(3)** in the Corporations Law.

- ***New subsection 122(7)*** defines "taxes" payable under a law of the Commonwealth or of a State or Territory, including, for example, levies, charges, and municipal rates.

Crown Debts (Priority) Act 1981

- omits from section 4, the words "221YHJ, 221YHZD or" and substituting "subsections 221 YHJ(3), (4) and (5) or 221YHZD(3), (4) and (5) or section".

Crimes (Taxation Offences) Act 1980

- extends the meaning of "income tax" in subsection 3(1) to include amounts payable under new Divisions 8 and 9 of Part VI of the Assessment Act.

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