



COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES

PROOF

BILLS

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

Second Reading

SPEECH

Thursday, 22 June 2017

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

SPEECH

Date Thursday, 22 June 2017
Page 26
Questioner
Speaker O'Brien, Ted, MP

Source House
Proof Yes
Responder
Question No.

Mr TED O'BRIEN (Fairfax) (11:39): The address from the member for McMahon illustrates the very reason why the Labor Party cannot govern again in this country. Yet again, it demonstrates that their strategy is to publicly beat their hairy chests but then, behind closed doors, get trapped in analysis paralysis. There are two measures in this bill: one relates to safe harbour and the other relates to the ipso facto clause. On both measures, the member for McMahon says that the Labor Party agrees—in principle, agrees; understands and acknowledges the intent, and agrees. But the Labor Party wants to hold this up in the Senate and kick these measures—which, they have acknowledged, are needed in this fast-moving modern economy—down that time-honoured road. They want to kick the can down that road into analysis paralysis: 'Let us have another analysis of these potential measures'—despite the fact that they agree with them. The Labor Party cannot take action. But they will beat their chests. The chest beating that we heard from the member for McMahon today related to phoenixing practices. Yet again, the Labor Party stands up and says: 'We want action on this. We want action.' Then they are given an opportunity, through this bill, to take action on safe harbouring and the ipso facto clause, and they say, 'No, we want further analysis.'

So it is on phoenixing, despite their chest beating—and I do agree with the member for McMahon about the dishonourable activity of some taking place, and I certainly have seen it in the construction industry, and I suspect that in the vocational education industry there have been examples in recent times. However, the government currently has a phoenixing task force that is putting together recommendations for action. Now the Labor Party have latched on to one issue—this singular issue of director IDs. That of course will be considered in due course, as the task force looks at its recommendations and the minister does also, subsequently. So here we have a big issue of phoenixing. The Labor Party only has one potential solution—that solution being duly considered. If the Labor Party wants to free-ride on the government's proposals that will come in due course on phoenixing, then fair enough—they are more than welcome to free-ride. But Labor should not put the government and the people of Australia in the same situation that they have put them in today where, when push comes to shove and a vote needs to be taken, they refuse to support, despite the fact that the member for McMahon has said, as to the two measures being considered in this bill, that the Labor Party agrees. The Labor Party should not put us in the same position when it comes to phoenixing, where they will say, 'We agree in principle, but we're too afraid to actually take action. Instead, we want to kick it down that time-honoured road again.'

Let us now talk about these laws, which we hope to have introduced if the Labor Party can get over its analysis problem. In the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 the measures are, of course, part of the broader range of measures reflected in the government's National Innovation and Science Agenda that the Prime Minister and the Minister for Industry, Innovation and Science announced in late 2015. Deputy Speaker, did you hear that I mentioned '2015'? We are in 2017, so that was two years ago. And still the Labor Party, despite agreeing, say they need more time to think, reflect and analyse. Extraordinary!

The government's agenda was developed in recognition of the great challenges and opportunities facing Australia in a world where the pace of change has, over just a handful of years, become technologically turbocharged. The Prime Minister and the minister both recognised that, to keep up with and continue to be competitive with the most innovative economies and societies in the world, we had to recognise the extent of the behavioural transformation that is currently underway, driven by technology, and scale up to it across the board. Promoting innovation and supporting risk-taking are key initiatives to deliver that competitiveness because both are proven pathways to success. That has been the case for as long as humans have been enterprising, but it is especially true today in our highly competitive economy.

To help promote and deepen our culture of innovation and indeed of risk taking, the National Innovation and Science Agenda has many measures. They include, for example, tax rebates of up to \$200,000 for investors in start-ups. The failure rate of start-ups is startling at over 90 per cent, and the biggest stumbling block—at least one of the major stumbling blocks—for the vast majority is not so much the soundness of their idea, the fundamentals of their business plan, but, rather, a lack of capital. If more investors can be lured away from the

more traditional targets, like real estate and the share market, many more start-ups are much more likely to be successful and create more jobs.

Another key measure to promote innovation is the commitment of \$500 million over four years towards restoring research funding. The CSIRO will have a \$200 million innovation fund. The National Collaborative Research Infrastructure Strategy has a guaranteed \$1.5 billion over a decade. There is \$250 million to help private entities commercialise medical innovations, \$520 million for the cyclotron and \$294 million for the Square Kilometre Array telescope. These are measures recognising that cutting-edge science is, as it always has been, the cutting edge of business and the requirement for economic success for societies that build jobs and high standards of living, because they are out in front; they are the leaders of industry.

The National Innovation and Science Agenda also seeks to address some issues that have developed over time in our law and practice and act as a brake on innovation and a brake on entrepreneurship. They hold back those who have the 'have a go' mentality that is so crucial when you are starting a business. Some of those measures in our system have developed over time into condemnation of failure rather than condemnation of breaking a law *per se*. Bankruptcy is a case in point. The historical constraint has been that, if declared bankrupt, you cannot start a new business for three years. The agenda suggests that one year is adequate. The majority of bankrupts do not leave a trail of ruin beyond their own finances. Many retain a determination to succeed and, with more experience and maybe better planning, and maybe better execution of plans, many ultimately do succeed.

In the same vein of encouraging and not discouraging entrepreneurship, this bill seeks to set in place two measures—one that has become known as the 'safe harbour provision' and the other deals with *ipso facto* clauses. The so-called 'safe harbour provision' aims to remedy a problem that can and does emerge when directors of companies feel vulnerable to personal responsibility for debts they incur when their business might be technically insolvent, even as they genuinely attempt to restore stability. What this has meant is that, in many instances, directors will call in outside administrators, even when a company is absolutely salvageable, simply because they do not want to take the risk of raising debt for which they could become personally liable. It is a fine line, obviously. The constraint on raising debt when there is knowingly no hope of restoring the fortunes of a company clearly needs to stay, but the unnecessary loss of jobs and economic activity that can flow from an overly cautious director bringing a company to a halt prematurely because of an unpreparedness to confront the risk of liability, even if he or she believes the debt could actually help save the business, deserves to go, and that is what this bill will do. With appropriate safeguards, it gives credit for what can be established to be good-faith actions by directors, even if those good-faith actions ultimately fail to save the business.

The bill also makes unenforceable, in certain circumstances, *ipso facto* clauses which currently allow the termination or variation of contracts during and after certain formal insolvency procedures are set in train, which can compound the impact that the reticence of directors to take good-faith steps to save their businesses can unleash. A supplier, for example, to a project that the threatened company is involved in can, when they learn there is a potential problem, pull the pin on contracts—a defensive measure to protect their own business or their own workers. That can lead to a sort of tailspin that makes the threat of insolvency a reality, when in fact the company might well be on the way to trading its way out of trouble.

This does not preclude, of course, two parties to a contract seeing that contract terminated for other reasons. It does not preclude other breaches of contracts allowing for one party to pull the pin. But what it seeks to avoid is a situation where the struggles of a business are used as an excuse for suppliers and other stakeholders to run for the doors—thereby creating an even greater problem for the struggling business, until it almost becomes a self-fulfilling prophecy—rather than encouraging businesses to trade their way out of problems when the business is still salvageable.

The enterprise incentives in this bill complement other aspects of the government's Innovation and Science Agenda, which is all about redoubling our efforts to build the national economy. As such, they are in line with the demands, the requirements, of being successful in the high-speed and challenging operating environment of the 21st century. In this digital age, which has so rapidly transformed the manner and speed by which business is done, there are increasingly the commercially quick and the commercially dead. When the concept is there, when the will is there, when the market is there and when you can access the capital when it is required, you have to act quickly, because, if that concept is good enough, somebody else will be onto it before you can blink. Within this fast-moving environment, it is almost unforgivable that the Labor Party, through the previous speaker, the member for McMahon, have confirmed that, while they understand it, they get it, they see the need for these

laws to be introduced, they refuse to have them pass through the lower house and the Senate. They recognise their importance, but again they will hold them up and kick the can down the road.

The bill we have today is a necessary step in helping to foster a culture that gives our entrepreneurs a better chance, through research, through better financial backing and through more appropriate governance to encourage the 'have a go' spirit that is key to prospering in this very fast-moving 21st century. I ask that the Labor Party reconsider its position and do what the previous speaker said and knows is the right thing to do, and that is to allow passage of this bill through both the lower house and the Senate.