Jurisdictional Report
AUSTRALIA

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This jurisdictional report is divided into four parts. Part A provides an overview of the Australian insolvency regime and briefly outlines the restructuring options and formal insolvency processes available under Australian law, as well as discussing common forms of business organisation, asset security, court involvement, directors' duties, corporate groups and insolvency office-holders, among others, in Australia. Parts B and C focus on restructuring processes, respectively, addressing voluntary administration and schemes of arrangement; and Part D discusses cross-border insolvency and related issues.

A OVERVIEW OF AUSTRALIAN INSOLVENCY LAW REGIME

i *Introduction*

1 The Australian insolvency regime operates in the context of a common law legal system which is derived from the English common law system. Australia has a federal system of government as established by the Australian Constitution in 1901 ("Constitution"). As part of this system, law-making and judicial powers are distributed between the federal government and the state or territory governments. Each level has a separate jurisdiction with its own parliament and hierarchy of courts. As a result, both federal laws and the laws of each state or

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territory are relevant. The two main sources of law in Australia are statute (being the law enacted by the federal parliament and the parliaments of the six states and two territories of Australia) and common law (being the body of un-enacted laws developed by the courts of Australia at either the federal or state level).

a Sources of Australian insolvency law

2 Australian corporate insolvency law is predominantly contained in the federal Corporations Act 2001 (Cth) ("Corporations Act") and its related rules and regulations which include:

(a) the Insolvency Practice Schedule (Corporations) ("IPSC") in Schedule 2 of the Corporations Act;
(b) the Corporations Regulations 2001 (Cth) ("Corporations Regulations"); and
(c) the Insolvency Practice Rules (Corporations) 2016 (Cth) ("Insolvency Rules").

3 Historically, the regulation of corporations had been the responsibility of the states and territories of Australia, as the Commonwealth was not given explicit power over corporations in the Constitution. Legislation passed in each of the states and territories was largely based on the companies legislation in the UK.[1] However, in response to two decisions of the High Court of Australia ("HCA") concerning the constitutional validity of legislation governing corporations enacted by the Australian federal government,[2] and after the states and territories of Australia referred this power to the Commonwealth, the Corporations Act was passed by the Commonwealth and became operative on 1 July 2001.

4 Australia's personal insolvency law, which concerns the insolvency of individuals, is governed by the federal Bankruptcy Act 1966 (Cth) and its related rules and regulations including the Bankruptcy Regulations 1996 (Cth). There are parallels between personal and corporate

1 Centre for Corporate Law, University of Melbourne Law School, "Key Documents in the History of Australian Corporate Law".
2 Corporations Bill 2001 Explanatory Memorandum at p 3.

insolvency law, particularly as a result of the amendments made to the Corporations Act by the Insolvency Law Reform Act 2016 (Cth), which attempted to harmonise the terms and concepts of the two regimes.

5 Australia has formally adopted the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency ("Model Law") by giving the Model Law the force of domestic law through the enactment of the federal Cross-Border Insolvency Act 2008 (Cth) ("CBI Act"). The Model Law is discussed in Part D below.

6 As part of the process of developing and implementing the regulatory framework governing insolvency law and practice, the legislature will typically engage in a consultation process in which submissions from various industry participants, stakeholders, bodies and other interested parties are sought at various stages. Through these consultative processes, in which professional bodies are typically key contributors, the legislature seeks feedback and uses information and insights gained to inform policy development. The consultation can take many forms including inquiries, round tables, issues papers, options papers, consultation papers and exposure draft legislation. The nature and extent of consultation will depend on the scope and complexity of the laws in question.

7 To illustrate the above, the consultation process surrounding the recent "safe harbour" reforms[3] to insolvency law and practice in 2018 involved, *inter alia*, the release of a proposal paper by the government which invited submissions from industry participants to inform the legislative development, followed by the later release of exposure draft legislation by the relevant Minister,[4] which sought further submissions and feedback from relevant persons and bodies on the proposed legislation.

3 Discussed in para 29 below.

4 Insolvency Law Reform Bill 2013 Explanatory Material, <https://treasury.gov.au/consultation/insolvency-law-reform-bill> (accessed 10 January 2020).

b Jurisdiction of the courts

8 The Australian courts are responsible for interpreting Australian insolvency legislation and any judicial interpretations will operate as binding precedent in accordance with the usual judicial hierarchy. However, in so interpreting, the Australian courts can have regard to analogous legislation or decisions in other jurisdictions. Typically, these are other common law jurisdictions, including the UK, the US, Canada, New Zealand and the Hong Kong Special Administrative Region.

9 The considerations relevant to the jurisdiction for insolvency proceedings in Australia are the same as for any civil litigation. The Federal Court of Australia ("Federal Court") has concurrent jurisdiction with the Supreme Courts of each of the states and territories in relation to the Corporations Act, with the rules for proceedings under the Corporations Act also harmonised between the state and territory Supreme Courts and the Federal Court. The Federal Court and the state and territory Supreme Courts also have jurisdiction under the CBI Act.

c Practice and procedure in the courts

10 In addition to the IPSC, Corporations Regulations and Insolvency Rules discussed above, further rules of practice and procedure applicable to the conduct of insolvency proceedings are found in the "rules of court" and legislative instruments with the force of law that govern the procedural framework within which matters are commenced and conducted in a particular court.[5] The courts also issue "practice notes", which complement legislative and regulatory provisions and provide a guide for the specific conduct for proceedings in that court.[6]

5 See, for example, Federal Court (Corporations) Rules 2000 (Cth) and Supreme Court (Corporations) Rules 1999 (NSW).

6 See, for example, the Federal Court of Australia, Commercial and Corporations Practice Note, Schedule 1 (which applies to all corporate insolvency matters) and Practice Note No SC EQ 4 – Corporations List (which applies to all corporate insolvency matters in the New South Wales Supreme Court).

d Role of the court in insolvency processes

11 With the exception of schemes of arrangement discussed in Part C, which involve two separate court hearings and various court approvals, Australian courts are not given a directing role and do not necessarily need to be involved in Australian corporate insolvency processes. The nature and scope of the court's supervisory role will very much depend on the circumstances of any given case.

12 Each voluntary administration, liquidation and receivership (all discussed further below) can proceed from start to finish with little or no court involvement. Notwithstanding this, the Federal Court and the state and territory Supreme Courts do have an important supervisory role, as the Corporations Act provides them with a number of wide-ranging powers in relation to the oversight of:

(a) insolvency practitioners, being formally "registered liquidators" for the purposes of the Corporations Act and including receivers, voluntary administrators and liquidators;[7] and

(b) the external administration of companies, which includes voluntary administration, deeds of company arrangement ("DOCAs"), liquidation and provisional liquidation.[8] Significantly, the court is empowered to "make such orders as it thinks fit in relation to the external administration of a company".[9] The court can make such orders on its own motion, or on the application of the corporate regulator, creditors or officers of the company.[10]

7 Insolvency Practice Schedule (Corporations) Div 45.
8 Insolvency Practice Schedule (Corporations) Div 5-15 and Div 90.
9 Insolvency Practice Schedule (Corporations) Div 90-15.
10 Insolvency Practice Schedule (Corporations) Div 90-20.

ii *Features and regulation of Australian companies*

a Features of Australian companies

13 In Australia, companies are distinguished based on their organisational structure. The basic features of a company are outlined in Chapter 2B of the Corporations Act. The most common company structures are public and proprietary companies. Public companies are not specifically defined in the Corporations Act[11] whereas proprietary companies are.[12] To be registered as a proprietary company, a company must be either limited by shares or be an unlimited company that has a share capital.[13] A public company must be either limited by shares, limited by guarantee, unlimited with share capital or be a no-liability company.[14]

14 A company becomes incorporated at the time it is registered by the Australian Securities and Investments Commission[15] ("ASIC"). Companies that are limited by shares are companies formed on the principle of having the liability of its members limited to the amount (if any) unpaid on the shares respectively held by them.[16] The majority of companies are proprietary.[17] Proprietary and public companies limited by shares are the most common types of companies. Partnerships are another common form of organisational structure and their form is governed by statute.[18]

b Australian Securities and Investments Commission

15 ASIC is an independent corporate regulator which has powers to prosecute breaches of the Corporations Act. It is typically the only

11 A "public company" is defined under s 9 of the Corporations Act 2001 (Cth) to mean "a company other than a proprietary company".
12 Corporations Act 2001 (Cth) ss 9 and 45A(1).
13 Corporations Act 2001 (Cth) s 112(1).
14 Corporations Act 2001 (Cth) s 112(1).
15 Corporations Act 2001 (Cth) s 119.
16 Corporations Act 2001 (Cth) s 9.
17 See Company Law Review Bill 1997 Explanatory Memorandum at para 7.2.
18 Corporations Act 2001 (Cth) s 115.

government regulatory agency involved in a business rescue in any official capacity.

16 ASIC issues various non-binding regulatory guides, several of which are focused on corporate insolvency. While the guides do not necessarily state the law, they offer guidance for insolvency practitioners and others involved in a rescue regarding their responsibilities under the law. The insolvency guides cover topics including a director's duty to prevent insolvent trading,[19] registration of liquidators[20] and reporting responsibilities of external administrators.[21]

iii *Asset security in Australia*

17 The most common forms of asset security provided by Australian corporate or individual borrowers as security for business finance tend to include (where relevant) security over land or an interest in land, plant, equipment or stock-in-trade, choses in action, money on deposit and shares.

18 The process of creating an effective security interest may vary depending on whether a company or an individual is the security provider or grantor. Generally, a security interest is granted in a security document such as a general security agreement. The federal Personal Properties Securities Act 2009 (Cth) ("PPS Act") governs security interests in personal property. The PPS Act creates a statutory framework that provides for the priorities between competing "security interests" over "personal property" as defined under the PPS Act. The current statutory scheme of priority will override the common law for a "security interest" over "personal property".

19 Australian Securities and Investments Commission, "Regulatory Guide 217: Duty to Prevent Insolvent Trading: Guide for Directors" (July 2010).

20 Australian Securities and Investments Commission, "Regulatory Guide 258: Registered Liquidators: Registration, Disciplinary Actions and Insurance Requirements" (March 2017).

21 Australian Securities and Investments Commission, "Regulatory Guide 16: External Administrators – Reporting and Lodging" (July 2008).

19 "Personal property" is broadly defined under the PPS Act to mean any property excluding land and fixtures attached to that land.[22] The PPS Act also defines a security interest to be an interest in personal property that in substance secures payment of a debt or other obligation, regardless of the form of the transaction.[23] The PPS Act does not apply to certain rights or interests including a lien (or any right of set-off).[24]

20 The PPS Act established the national Personal Property Securities Register ("PPS Register").[25] The PPS Register is not a register of title or ownership of personal property and does not confer any title on the secured property once registered. Instead, the PPS Register acts as a noticeboard of security interests in personal property by reference to the grantor of the security interest and gives the public notification that there may be a security interest in relation to that secured property. While registration is not compulsory, it can operate to perfect a security interest and to resolve disputes about the priority of security interests, particularly when there are security interests that are not registered or registered later in time.

21 An application for registration on the PPS Register must be in the approved form and consist of a financing statement.[26] Applications can be made online on the Australian Financial Security Authority or PPS Register webpage.

22 Any person may search the PPS Register for details of a registration or security interests registered against a particular grantor.

22 Personal Properties Securities Act 2009 (Cth) s 10.
23 Personal Properties Securities Act 2009 (Cth) s 12.
24 Personal Properties Securities Act 2009 (Cth) s 8.
25 The Personal Property Securities Register is hosted on the website of the Australian Financial Security Authority and accessible at <https://www.ppsr.gov.au/> (accessed 10 January 2020).
26 Personal Properties Securities Act 2009 (Cth) s 153.

iv *Directors' duties*

a Duties of directors of distressed entities

23 Directors of all entities owe obligations to ASIC. These continue when the entity is distressed, and include reporting obligations such as filing financial statements, and keeping company information such as registered offices, shareholdings, and officeholders up to date.[27]

24 For publicly listed companies, the listing rules of the Australian Securities Exchange ("ASX") ("ASX Listing Rules") require continuous disclosure of material information.[28] The requirement is such that when an entity is or becomes aware of any information that could reasonably be expected to have a material effect on its share price, the entity must immediately inform the ASX. The directors are responsible for complying with this rule, until they are displaced by the appointment of external administrators, who would then take responsibility for compliance. The appointment of a receiver, administrator or a liquidator is given in the ASX Listing Rules as an example of information that would require immediate disclosure. Practically speaking, it is highly likely that a company would be in a trading halt before the appointment of external administrators.

25 The position is not quite as clear where an entity is distressed, but not yet insolvent. The ASX has stated in its guidance regarding the continuous disclosure rules that the mere fact that directors are relying on the safe harbour defence (discussed below, being a defence for directors against insolvent trading) does not of itself require disclosure, because "most investors would expect directors of an entity in financial difficulty to be considering whether there is a better alternative for the entity and its stakeholders than an insolvent administration".[29] However, where the course of action ceases to be confidential or becomes a definitive plan, disclosure will be required. This means that directors

27 Corporations Act 2001 (Cth) Pts 2B.5, 2C.1 and 2D.5.

28 Australian Securities Exchange Listing Rules ch 3, r 3.1.

29 Australian Securities Exchange Listing Rules Guidance Note 8, "Continuous Disclosure: Listing Rules 3.1–3.1B" (23 August 2019) Pt 5.10 at pp 40–41.

need to continually contemplate their disclosure obligations during the process.

26 Two key considerations for directors of distressed entities in pre-insolvency and insolvency proceedings are employee entitlements and tax considerations. Directors must ensure that they continue paying wages and necessary superannuation payments under the Superannuation Guarantee (Administration) Act 1992 (Cth). To the extent that employee entitlements are not paid, the necessary payments due to employees will rank in priority over all other unsecured debts and claims.[30] Both superannuation and taxation are administered by the Australian Tax Office ("ATO"). The ATO can, if superannuation or employee tax withholding obligations are not met, seek to recover the amounts from the director or directors of a company personally. However, the penalty may in certain circumstances be remitted if the company goes into voluntary administration or liquidation.[31] Generally, if a company has not paid its tax liabilities, the ATO can issue a statutory demand which, if it remains unpaid, gives rise to a presumption of insolvency based upon which the ATO can then commence court proceedings to wind up the company.

b Duty to prevent insolvent trading

27 Directors have a statutory duty to prevent the company from trading whilst insolvent.[32] If there are reasonable grounds for suspecting that the company is, or might become, insolvent by incurring a debt, the director must stop the company from incurring that debt or further liabilities, and appoint voluntary administrators to the company. Failing that, if the director cannot stop the course of action, he should resign from the board to avoid personal liability for insolvent trading.[33]

30 Corporations Act 2001 (Cth) s 556.

31 Australian Tax Office, "Penalties, Amendments and Objections" (8 October 2018).

32 Corporations Act 2001 (Cth) s 588G.

33 *Morley v Statewide Tobacco Services Ltd* (1992) 8 ACSR 305.

28 Failure to prevent insolvent trading can lead to civil penalties, or criminal penalties if the failure was dishonest.[34] If found guilty of the criminal offence, a director may be subject to penalties including fines or a period of imprisonment, as well as disqualification from being a director. Additionally, as insolvent trading is a breach of a director's duties, ASIC, a liquidator or a creditor may initiate proceedings against the director or directors personally for compensation.

c "Safe harbour" reform

29 Reforms implemented in 2017 provide a "safe harbour" for directors[35] who suspect the company is or may become insolvent. The protection is for a reasonable period from the time the directors start to develop courses of action that are reasonably likely to lead to a better outcome for the company than administration or liquidation. In determining whether something is "reasonably likely" to lead to a better outcome, relevant factors for consideration include whether the director is:[36]

(a) keeping himself properly informed of the company's financial position;
(b) taking appropriate steps to prevent misconduct by the company's officers and employees that could affect the company's ability to pay its debts;
(c) taking steps to ensure that the company is keeping proper financial records consistent with the size and nature of the company;
(d) obtaining advice from an appropriately qualified entity who was given sufficient information to give appropriate advice; or
(e) developing a plan for restructuring the company to improve its financial position.

30 Additionally, where a company is in distress or moving towards insolvency, the directors' duty to act in good faith in the interests of the

34 Corporations Act 2001 (Cth) ss 588G(2)–588G(3).
35 Corporations Act 2001 (Cth) ss 588GA–588GB.
36 Corporations Act 2001 (Cth) s 588GA(2).

company[37] may require the officers to consider the interests of creditors when making decisions.

d Duties of directors and officers of companies in external administration

31 The appointment of an external administrator to a company triggers certain duties of its directors and officers. These are centred around assisting the external administrator to carry out his duties. Relevantly:

(a) Within five business days of the appointment of a voluntary administrator, the directors must provide a report to the administrator about the company's business, property, affairs and financial circumstances.[38] Failure to provide this report if requested, without reasonable excuse, is an offence.

(b) As soon as practicable after the appointment of a liquidator, each officer of the company must deliver all the company books in the officer's possession, attend on the liquidator when reasonably requested, give the liquidator information when requested, and otherwise do anything reasonably required to help in the winding up.[39] Failure to comply without reasonable excuse is a strict liability offence.

v *Formal insolvency processes applicable to corporate debtors*

32 This section of Part A provides an overview of the formal insolvency processes available to corporate debtors in Australia: receivership and liquidation.

33 Formal insolvency proceedings typically apply to a "company", defined in the Corporations Act to mean a company registered under the Corporations Act and includes a "Part 5.7 body" in Parts 5.7B and 5.8 of the Corporations Act and an unincorporated registrable body under

37 Corporations Act 2001 (Cth) s 181.
38 Corporations Act 2001 (Cth) s 438B(2).
39 Corporations Act 2001 (Cth) s 530A.

Part 5B.1 of the Corporations Act.[40] There are four formal insolvency processes available:

(a) voluntary administration;
(b) schemes of arrangement;
(c) liquidation or winding up;[41] and
(d) receivership.

34 There is no hierarchy or order of priority between the different types of formal insolvency proceedings. Rather, the choice of insolvency avenue depends on who initiates the proceedings (*eg*, a corporate debtor or other interested party, usually a creditor) and what outcome they are seeking to achieve. Foreign creditors are treated equally with other creditors under Australian domestic insolvency processes.

a Liquidation or winding up

35 A liquidation or winding up is a terminal insolvency process that allows for the appointment of an independent and qualified person, the liquidator, to take control of the company, gather in its assets and discharge its liabilities for the purpose of winding up the company's affairs in an orderly manner for the benefit of all creditors, and ultimately to formally deregister the company.[42]

36 The liquidation process requires a liquidator to:

(a) Analyse the books and records of the company to establish when and under what circumstances the company became insolvent.
(b) Investigate the affairs of the company to determine any potential causes of action that could increase the assets of the company. In some circumstances, a liquidator may decide to conduct public examinations of the directors and officers to obtain further information and evidence.

40 Corporations Act 2001 (Cth) s 9.

41 It should be noted that although provisional liquidation exists in Australia, functionally it has been overtaken by the voluntary administration process, introduced in 1993, as a result of which it is very rarely used and is not discussed in this document.

42 See generally Pts 5.4 and 5.4B of the Corporations Act 2001 (Cth).

(c) Comply with various statutory reporting obligations, including reporting to creditors and to ASIC.

(d) Realise the assets and discharge the liabilities of the company in accordance with the priority regime created under the Corporations Act.[43] In doing so, the liquidator has broad discretionary powers, including in the case of an insolvent company the power to set aside transactions entered into by the company leading up to its insolvency, known as "voidable transactions".[44]

(e) Call and adjudicate proofs of debt for dividend purposes (if appropriate).

37 A liquidator can be appointed to a company by:

(a) the members of a company (*ie*, its shareholders), voluntarily by special resolution (which is a resolution by 75% of its shareholders) which is known as a member's voluntary winding up or "MVL".[45] Before passing the special resolution, the directors must pass a resolution that the company is solvent;[46]

(b) the creditors of the company, known as a creditors' voluntary winding up or "CVL" if the directors are unable to complete a declaration of solvency when winding up the company, or if the creditors resolve at the second meeting of creditors in a voluntary administration that the company be wound up;

(c) the court, upon the application of a creditor, director or shareholder of the company, known as a compulsory or court-ordered winding up; or

(d) ASIC, upon the fulfilment of certain conditions, in order to deal with a company that is not trading and is no longer complying with its reporting obligations.[47]

38 Once a liquidator is appointed to a company, there is an automatic statutory moratorium in respect of all claims, including claims that were

43 Corporations Act 2001 (Cth) s 477.
44 Corporations Act 2001 (Cth) ss 588FA–588FE.
45 Corporations Act 2001 (Cth) ss 491 and 9.
46 Corporations Act 2001 (Cth) s 494.
47 Corporations Act 2001 (Cth) s 489EA.

commenced prior to the liquidator being appointed, against the company during the liquidation (subject to certain limited exceptions). The stay of proceedings applies to a court-ordered liquidation[48] and a voluntary liquidation.[49] Notwithstanding the appointment of a liquidator, a secured creditor can realise or otherwise deal with its secured property; and he assumes control of the company's business, property and affairs. The directors and officeholders lose their powers to act for or on behalf of the company.

39 Liquidators are officers of the company and, as such, owe the statutory duties of company directors and officers set out in sections 180–184 of the Corporations Act to the company to which they are appointed. Broadly, these duties are to exercise their powers with due care and diligence, to exercise the powers in good faith in the best interests of the corporation and for a proper purpose, and to not improperly use their position or information gained as a result of their office held in the company. Those duties are not owed to individual creditors.[50]

40 Directors of a company in liquidation must assist the liquidator.[51]

I RANKING OF CREDITOR CLAIMS IN LIQUIDATION

41 To pursue their claims against a company in liquidation, unsecured creditors must, when the liquidator calls for proofs of debt, submit a proof of debt to the liquidator, who will then adjudicate each claim and notify the unsecured creditors within seven days if their claim has been admitted, in part or in full, or rejected. Unsecured creditors are entitled, within a certain period, which is determined by the liquidator, to appeal to the court if they are dissatisfied with the liquidator's decision.

48 Corporations Act 2001 (Cth) ss 467(7) and 471B.
49 Corporations Act 2001 (Cth) s 500.
50 *Macks v Viscariello* (2017) 353 ALR 201.
51 Corporations Act 2001 (Cth) s 530A. See para 31(b) above.

42 In a liquidation:[52]

(a) Generally, secured creditors will be able to have recourse to the collateral securing their debt. However, eligible employee entitlements (defined below) can take priority over the interest of a secured party in relation to a "circulating security interest", the statutory equivalent of floating charge assets,[53] to the extent of any insufficiency in the assets otherwise available to meet those entitlements.[54]

(b) A creditor with a claim against the company that is subject to an insurance policy is entitled to receive the net proceeds of the insurance policy in priority to other unsecured creditors.[55]

(c) Specified entitlements of pre-commencement employee creditors have priority over ordinary pre-commencement unsecured creditors (and potentially also secured creditors to the extent described at sub-paragraph (a)), being:

(i) wages, superannuation contributions and "superannuation guarantee charge" payable in respect of services rendered before the commencement of the liquidation;

(ii) amounts due in respect of injury compensation where the liability arose before the commencement of the liquidation;

(iii) amounts due on or before the commencement of the liquidation in respect of leave of absence; and

(iv) retrenchment payments.

(employee entitlements, and excluding sub-sub-paragraph (ii), eligible employee entitlements);[56] and

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52 Excluding costs of the application to wind up the company which have higher priority pursuant to s 556(1)(b) of the Corporations Act 2001 (Cth).

53 A circulating security interest is a security interest pursuant to the Personal Properties Securities Act 2009 (Cth) ("PPS Act") if it has attached to a circulating security asset within the meaning of the PPS Act and the grantor has title to the asset – effectively a statutory version of the floating charge.

54 Corporations Act 2001 (Cth) s 561.

55 Corporations Act 2001 (Cth) s 562.

56 Corporations Act 2001 (Cth) ss 556(1)(e) to 556(1)(h); there are limitations on the priority to which "excluded employees", being employees who were a director in the preceding 12 months, or an employee who was a spouse or relative of such a director, are entitled to this priority. The employee priority extends to persons who have advanced funds to the debtor company to pay the entitlements listed at

(*continued on the next page*)

(d) pre-commencement unsecured creditors otherwise rank equally or *pari passu*.

43 In liquidation, employees may have recourse to a Commonwealth government scheme, known as the fair entitlements guarantee[57] ("FEG"), which pays them a portion of their eligible employee entitlements (excluding superannuation) determined pursuant to the applicable rules when a company goes into liquidation and cannot pay those amounts. The Commonwealth, and any other creditor which funds the company to pay eligible employee entitlements, is entitled to be subrogated to the same priority as the employee in respect of the funded eligible employee entitlements.[58]

II AVOIDANCE, PREFERENCE AND CLAWBACK RULES IN LIQUIDATION

44 Division 2 of Part 5.7B of the Corporations Act deals with what are known in Australia as "voidable transactions". The voidable transaction provisions of the Corporations Act only apply in liquidations and only a liquidator may apply to the court[59] to seek orders in relation to such a transaction.[60]

45 The main species of voidable transactions available to liquidators are described below.

(a) **Unfair preferences**. A transaction (typically a payment made by a company to one of its creditors) may be voidable as an unfair preference if:

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paras 42(c)(i) and 42(c)(iii) of the definition of employee entitlements above, who are subrogated to the relevant priority: see s 560 of the Corporations Act. Eligible employee entitlements can also take priority over some secured interests, as discussed in para 42(a) above, being those in respect of "circulating security interests".

57 Fair Entitlements Guarantee Act 2012 (Cth).

58 Corporations Act 2001 (Cth) s 560.

59 A creditor cannot apply directly to the court to set aside the voidable transaction unless the liquidator has assigned the cause of action to that creditor: Insolvency Practice Schedule (Corporations) Div 100-5.

60 See generally ss 588FE and 588FF of the Corporations Act 2001 (Cth).

(i) the company and the creditor are parties to the transaction;
(ii) the transaction is an "insolvent transaction" of the company (meaning broadly, it occurred at a time the company was insolvent or the company became insolvent because of the transaction);
(iii) the transaction was entered into during the six months ending on the "relation-back day" (as defined below) (or within four years if the counterparty is a related entity); and
(iv) the transaction results in the creditor receiving, in respect of an unsecured debt, more than the creditor would receive from the company in respect of that debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company. There is no requirement of intent on the part of the creditor.

(b) **Uncommercial transactions**. An "uncommercial transaction" entered into within two years prior to the "relation-back day" (or within four years if the counterparty is a related entity) is voidable if it was entered into or given effect to at a time when the company was insolvent, or if the company became insolvent as a result of it entering into the transaction. Whether a transaction is "uncommercial" is assessed by reference to, among other factors, the benefits and detriment to the company and the other parties to the transaction. The test for what constitutes an uncommercial transaction has been expressed as a "bargain of such magnitude that it could not be explained by normal commercial practice"[61] and it includes, but is not limited to, a disposition of company property at an undervalue.

(c) **Unreasonable director-related transactions**. A transaction involving:
(i) a payment made by the company;
(ii) disposition of property by the company;
(iii) the issue of securities by the company; or
(iv) the incurring by the company of an obligation to make such a payment, disposition or issue,

61 *Demondrille Nominees Pty Ltd v Kevin R Shirlaw & Cornelis Holdings Pty Ltd* (1997) 25 ACSR 535.

which is made to a director of the insolvent company (or close associate of the director) may be voidable. The transaction must have been entered into, or given effect to, during the four years ending on the "relation-back day" or after that date but prior to the commencement of winding up of the company. The transaction must be one that a reasonable person in the company's circumstances would not have entered into.

(d) **Unfair loans**. A loan may be voidable if it has been provided to the insolvent company on terms which are considered unfair to the company (*ie*, extortionate interest or charges) at any time on or before the day the winding up began.

46 The "relation-back day", a key concept in the context of voidable transactions, is the deemed date of commencement of the liquidation, and can be an earlier date than the actual commencement of the liquidation if, for example, voluntary administration immediately precedes the liquidation, in which case the "relation-back day" is the day the voluntary administrator was appointed.[62]

47 Creditors are frequently pursued by liquidators in relation to unfair preferences, because the test involves preferential effect rather than intent or value. There are limited statutory defences potentially available to a person who is sued in relation to an unfair preference claim or an uncommercial transaction claim.[63]

b Receivership

48 Receivership (also referred to as "controllership" in the Corporations Act) is available to a secured creditor and allows that secured creditor, upon a default under the relevant security, to appoint a third party to take control of the secured property and realise that property in order to discharge the secured debt.[64] Less commonly,

62 See s 91 of the Corporations Act 2001 (Cth) for the meaning of "relation-back day".

63 Corporations Act 2001 (Cth) s 588FG.

64 See generally Pt 5.2 of the Corporations Act 2001 (Cth).

a receiver may be appointed by the court to protect the company's assets or carry out particular tasks required by the court.

49 Typically, a receiver takes control of the secured property over which he is appointed and can conduct a sale or disposal of that property on the company's behalf, for the benefit of the secured creditor. To this extent, the powers of the receiver supersede the authority of the directors although the directors otherwise retain their duties and powers.[65]

50 The main powers of the receiver are derived from the terms of the security document, but the Corporations Act provides a power "to do, in Australia and elsewhere, all things necessary or convenient to be done for or in connection with, or as incidental to, the attainment of the objectives for which the receiver was appointed".[66] A receiver does not deal with the claims of other creditors of the company, such as its unsecured creditors.

51 Broadly, the proceeds from a sale collected by a receiver are generally applied in the following order of priority:[67]

(a) first, in discharge of the receiver's remuneration and expenses;
(b) second, and in respect of the proceeds of circulating assets, in payment of certain priority claims in the following order:
    (i) the receiver's costs and fees in collecting this money;
    (ii) certain priority claims, including eligible employee entitlements (if the liability for these has not been transferred to a new owner); and then
    (iii) repayment of the secured creditor's debt;
(c) third, in discharge of the debt owed by the company to the secured creditor (including any interest, costs and expenses); and
(d) finally, any surplus is remitted to the company.

65 Notably, although it is not formally recognised in Australia, credit bidding is a method available to a secured creditor through the appointment of a receiver.

66 Corporations Act 2001 (Cth) s 420.

67 As mandated by the terms of the security documents and s 433 of the Corporations Act 2001 (Cth).

52 This is important to note in relation to any restructuring strategy pursued through a receivership, for example in a loan-to-own scenario. These distribution limbs should be kept in mind to make sure the merit of undertaking this process can be justified.

53 Receivers are officers of the company, and as such owe to the company to which they are appointed the same statutory duties as company directors and officers set out in sections 180–184 of the Corporations Act (see paragraph 39 above).

54 A receiver's primary duty is to his appointor, unless otherwise stated in the security document,[68] but receivers also owe a statutory duty to take "all reasonable care" when exercising a power of sale over company property, to obtain market value for that property, or if there is no market value, the best price reasonably available.[69] This statutory duty has been interpreted by the courts as being focused on the process followed by the receiver in exercising the power of sale (rather than the price ultimately received).[70]

55 A receivership may take place concurrently with either a voluntary administration or a liquidation. Receivership can be used to achieve a business rescue by way of sale of secured property (which can be effected by way of a credit bid).

56 There is no automatic statutory stay on proceedings against a company while a receiver is appointed (unless there is also some other form of external administrator appointed concurrently, for example, a voluntary administrator). The appointment of a receiver does not, of itself, prohibit other creditors or third parties pursuing claims against the company. However, if such claims are unsecured, they will generally rank behind the claims of any secured creditor.

68 *Re Vimbos Ltd* [1900] 1 Ch 470 at 473.

69 Corporations Act 2001 (Cth) s 420A.

70 *Florgate Uniforms Pty Ltd v Orders* (2004) 11 VR 54; 187 FLR 142 at [443]; *Boz One Pty Ltd v McLellan* [2014] VSC 208 at [721].

vi *Restructuring options*

a Informal workouts

57 While there are no formal legal structures in Australia developed to implement out-of-court workouts, there are a series of market practices relevant to consensual restructurings, including:

(a) standstill arrangements, where creditors agree to forbear enforcement of a debt owed to them in consideration of the debtor undertaking certain prescribed steps (*eg*, enhanced financial reporting and asset sales); and

(b) restructuring co-ordination or implementation agreements, where creditors and the company agree to take certain agreed steps and use reasonable or best endeavours to complete a restructuring in a specified manner. Such arrangements typically include an undertaking by the creditors that they will not trade their debt or, if they do, they will procure that the transferee agrees to be bound by the restructuring co-ordination agreement.

b Formal restructuring options

58 The primary formal tools used to effect a restructuring in Australia are voluntary administration resulting in a deed of company arrangement ("DOCA") (see Part B below) and a creditors' scheme of arrangement ("Scheme") (see Part C below). Restructuring via a DOCA will sometimes involve a concurrent receivership, which is a way to effect a credit bid.

59 There is a fair degree of flexibility with rescue plans effected via a DOCA or a Scheme, which can encompass modification of payment terms, sale of business or assets, transfer of control of the shares in the company to a third party, compromise of debts and liabilities of the company (including pre-commencement contractual claims), conversion of debt to equity, issuing of new securities or the injection of new capital and the transfer of property or liabilities to another entity.

60 In the case of a DOCA, there is no limitation on who can propose a DOCA. While no particular timing is specified by statute for the

submission of proposed DOCAs to the administrator, the second meeting of creditors to consider any DOCA proposal must be convened in a relatively short time, in the absence of a court order extending the convening period, and so DOCA proponents should act quickly.

61 In a Scheme, either affected creditors or the company could initiate discussions and make a proposal for a Scheme. As a Scheme is negotiated in the absence of any formal insolvency process, there is no specified time applicable.

62 Once the DOCA or Scheme is effective, it binds all affected creditors (in the case of a DOCA),[71] or all creditors in the relevant class or classes (in the case of a Scheme), irrespective of whether creditors elect to vote and even if they do not receive notice.[72] A DOCA will bind all creditors and members of the company,[73] although a secured creditor is still able to enforce his security[74] unless the DOCA provides otherwise and the secured creditor voted in favour of the DOCA, and absent a court order otherwise.[75] A Scheme will only bind the specific class or classes of creditors subject to the Scheme, such as only secured creditors, and so it is possible to be more targeted than in a DOCA. In both cases, it is possible for debts owed to the state to be bound.

63 All creditors (in the case of a DOCA) and creditors in the relevant classes (in the case of a Scheme) will receive notice of the proposed rescue plan shortly before the time they are called upon to vote on the plan (see Parts B and C). Creditors will not receive any earlier formal notice, such that they can participate in negotiations over the content of the plan. However, if the DOCA or Scheme is to succeed, the administrator or the company (as appropriate) will take steps to ensure that the requisite voting majorities will be met and engage with key stakeholders.

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71 Corporations Act 2001 (Cth) s 444D, as far as concerned claims arising on or before the "relevant date" specified in the deed of company arrangement (being generally the date on which the administration commenced).

72 Corporations Act 2001 (Cth) s 411(4).

73 Corporations Act 2001 (Cth) s 444G.

74 Corporations Act 2001 (Cth) s 444D.

75 Corporations Act 2001 (Cth) s 444F.

64 While there are no specific statutory provisions dealing with "pre-packs", and they are relatively uncommon in Australia, they can be implemented via a pre-planned transaction executed in voluntary administration or DOCA, where the administrator can be comfortable that the process that led to the transaction is sufficiently robust or that a "pre-packed" transaction is justifiable for some reason such as the critical support of the secured creditor or of a franchisor, or if due to the nature of the business, delay will be fatal. However, usually the administrator will undertake his own process to identify potential transactions to restructure the company.

65 A Scheme is an inherently "pre-packaged" rescue plan, being agreed to by the company and at least some of the affected creditors before an application is made to the court to convene a meeting of creditors (or classes of creditors) to consider the proposed Scheme.

66 Both a DOCA and a Scheme are capable of binding dissenting stakeholders, assuming the requisite voting majorities are met. However, a DOCA cannot bind a dissenting secured creditor absent a court order.[76] A cram-down within a particular class of creditors, such as a dissenting lender within the senior lender group, can be done by a Scheme in respect of the particular class.

67 Shareholders can lose their equity, or any potential value in that equity, and their "subordinated claims" as a result of a DOCA or a Scheme.

68 Often, the "rescue" will be effected immediately on execution of the DOCA[77] or the implementation of the Scheme, with the process of adjudicating on creditors' claims and paying dividends taking around six to 12 months, and potentially longer if there is deferred consideration, interim dividends or protracted disputation regarding claims.

76 Corporations Act 2001 (Cth) s 444F.

77 This includes where the claims of creditors are immediately transferred to a "creditors' trust" and the purchaser takes control of the shares in the company.

c Why choose a deed of company arrangement or a creditors' scheme of arrangement?

69 Since the introduction of the voluntary administration process in Australia in 1993, a DOCA has become the most common method of restructuring companies. This is because it is perceived to be relatively quick and cheap (including because it can be done entirely without court involvement) and flexible (including through the use of court orders).

70 Creditors' schemes of arrangement are not as common as they were before the introduction of the voluntary administration regime, including due to the perception that they are more time-consuming and more expensive (noting that two court hearings are necessary in a Scheme).

71 However, a creditors' scheme of arrangement is commonly used:

(a) where the claims of only one or more classes of creditors are to be compromised, and not the claims of all creditors (commonly, secured creditors, *eg*, to cram down a dissenting secured creditor); and
(b) where third-party releases are required (which is not permissible via a DOCA).

72 There is more scope for a DOCA to be set aside after being approved by creditors than a Scheme.

vii *Employees*

73 Employees receive priority in respect of their eligible pre-commencement claims in liquidation in Australia, as discussed at paragraph 42 above. If employees are retained by the company under the control of an administrator or receiver, the administrator or receiver will be personally liable for the wages and entitlements of those employees for the period of their employment by the administrator or receiver.[78]

78 Corporations Act 2001 (Cth) ss 443A and 419.

74 In Australia, generally employers do not provide pensions to employees. Rather, employers are obliged by law to make regular contributions to the employee's superannuation fund as a percentage of the employee's salary, and each superannuation fund is held and managed by third parties. This has the result that, while some contributions by the employer to the employee's superannuation fund may be outstanding, the underlying superannuation liabilities in respect of the employee will not be a liability of the employer. Accordingly, superannuation or pension benefits do not play as significant a role in an Australian restructuring as may be the case in other jurisdictions.

75 Termination by reason of a formal insolvency process generally triggers a termination of employment on the grounds of redundancy. A redundancy will not crystallise an entitlement to a claim for unfair dismissal in Australia provided that the redundancy is a "genuine redundancy" under the Fair Work Act 2009 (Cth) ("Fair Work Act"). A redundancy crystallises various entitlements of the employee such as for accrued leave, long service leave, notice and redundancy pay.

76 In a share acquisition, the employees' employer does not change and existing employment contracts therefore remain in force, as does the employer's liability for all existing employment arrangements.[79]

77 In an asset sale, under Australian law, it is not possible to merely "transfer" employees between companies and it is necessary for the current employer to terminate the employment of an affected employee and for the new employer to offer the affected employee employment on agreed terms and conditions.

79 This includes in relation to (a) existing contractual terms and conditions of employment; (b) the application of any awards or other industrial instruments; (c) the value of accrued employee entitlements that are calculated upon length of service, such as personal leave (including sick and carer's leave), annual leave, long service leave, entitlements in relation to notice of termination and redundancy pay (if any); (d) any entitlements to other forms of leave based on service (for example, parental leave); and (e) any liability arising from the old employer's failure to comply with (a) and (b).

78 An asset sale generally triggers a "transfer of business" under the Fair Work Act. Certain statutory employee entitlements such as annual and personal (sick and carer's) leave are calculated based on an employee's period of "continuous service" and where there is a transfer of business under the Fair Work Act, there is a statutory presumption that a transferring employee's service will be continuous as between an old and new employer.[80]

79 Employees, as creditors, are entitled to the same voting and participation rights as other unsecured creditors in a liquidation, voluntary administration or DOCA, and will often control the "number" vote on any resolution of creditors, including on any application to remove the incumbent liquidator, administrator or deed administrator.

80 Trade unions, representing employees, are very active in the Australian employment law context, including in insolvency processes. No specific statutory provision is made for them or other representative bodies in those processes, although orders have been obtained in larger voluntary administrations for collective representation of and voting by employees. As employees will often control the "number" vote on any resolution of creditors, trade unions can exercise significant influence in formal insolvency proceedings.

viii *Corporate groups*

81 A "group of two or more companies"[81] in liquidation can be "pooled" either by a declaration by the liquidator which has been approved by creditors, if (a) the companies are related bodies corporate of each other; (b) the companies are jointly liable for one or more debts or claims; (c) the companies jointly own or operate particular property that is or was used, or for use, in connection with a business, scheme or undertaking, carried on jointly by the companies; or (d) one or more of the companies own particular property that is or was used, or for use, in

80 Fair Work Act 2009 (Cth) s 22, although there is the ability for non-associated entities to decide not to recognise prior service in respect of annual leave and redundancy only.

81 Corporations Act 2001 (Cth) s 579E.

connection with a business, scheme or undertaking carried on jointly by the companies.[82]

82 If the liquidator makes a pooling determination, he is required to convene separate meetings of the eligible unsecured creditors of each of the companies to gain approval of the pooling determination within five business days.[83] A liquidator's notice must contain a statement setting out if any eligible unsecured creditors will be disadvantaged, if the determination is in their interests, likelihood of return and any other relevant information.[84] The determination is cancelled if it is not passed. Alternatively, a liquidator may apply to the court for approval.[85] However, if the determination will prejudice eligible unsecured creditors, or the court is aware that eligible unsecured creditors have not consented, the court must not approve the determination.[86]

83 The effect of a pooling declaration is that:

(a) each company is taken to be jointly and severally liable for each debt payable by, or claim against, each company in the group;
(b) each debt payable by a company or companies in the group to any other company or companies in the group is extinguished; and
(c) each claim that a company or companies in the group has against any other company or companies in the group is extinguished.

84 If companies have been pooled in a liquidation by either determination or court order, consolidated meetings of companies can be held.[87]

85 Unlike in liquidation, there are no formal statutory mechanics for companies in voluntary administration or DOCA to be "pooled". However, generally, the same voluntary administrator is appointed to all

82 Corporations Act 2001 (Cth) Pt 5.6, Div 8.
83 Corporations Act 2001 (Cth) s 577.
84 Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-180.
85 Corporations Act 2001 (Cth) s 579E.
86 Corporations Act 2001 (Cth) s 579E(10).
87 Corporations Act 2001 (Cth) s 579L.

group companies, and the courts have sanctioned the use of pooling via DOCA for related companies in appropriate cases,[88] such as where the companies are jointly and severally liable for debts.[89] It is now common for a group of companies to have, in effect, a "consolidated" DOCA where all creditors (other than intra-group claims) participate in the one fund.

86 An application can be made to the court to convene a meeting to vote on a Scheme in respect of several companies in the same proceeding, resulting in a consolidated set of orders.[90] While generally consolidated meetings in respect of group entities are not ordered, they may be if appropriate.[91] There are also specific provisions to assist large corporate groups where there is to be a transfer of all of the assets and liabilities of the subsidiaries to the parent, which may permit a single meeting and a single explanatory statement.[92]

ix *Regulation of insolvency and insolvency practitioners*

87 Only qualified insolvency practitioners registered with ASIC can be engaged to take appointments in insolvency proceedings. External administrators (namely, administrators of a company, administrators of a DOCA, liquidators and provisional liquidators)[93] as well as receivers are required to be independent from the company and not have any personal or business interest in the company or any person involved in the insolvency, whether the personal or business interest is real or perceived. Pre-insolvency proceedings in Australia, such as informal workouts, do not involve insolvency office-holders.

88 See, for example, *Mentha v GE Capital Ltd* (1997) 154 ALR 565; 27 ACSR 696; and *Re Humphris, in the matter of ACN 004 987 866 Pty Ltd* [2003] FCA 849.

89 Such as will often be the case where the group companies have executed deeds of cross guarantee, guaranteeing the debts of each other group company on a winding up, in return for financial reporting relief from the Australian Securities and Investments Commission.

90 *Re Safety Fix Pty Ltd* [1962] VR 467.

91 *Re Casablanca Wines Bar Pty Ltd* (1978) 3 ACLR 318.

92 Corporations Act 2001 (Cth) ss 411(1A), 411(1B) and 412(1)(a).

93 Insolvency Practice Schedule (Corporations) Div 5-20.

88 Insolvency practitioners and the conduct of external administrations or insolvency proceedings are subject to supervision, primarily by the court (as discussed above) and by ASIC as the regulator responsible for insolvency practitioners (including their registration), and for the regulation of the insolvency regime generally.

89 All external administrators are required to lodge a notice of appointment with ASIC.[94] They must also lodge a report with ASIC if the external administrator believes that an officer, employee or member of the company under external administration may have been guilty of an offence in relation to the company.[95]

90 ASIC may issue a "show cause" notice as to why a registered liquidator should continue to be registered if, amongst other circumstances, it has reason to believe that the liquidator has contravened, or has caused the company to which the liquidator is appointed to contravene, a provision of the Corporations Act, or if the liquidator has failed to properly carry out his duties.[96] If the liquidator does not respond, ASIC can convene a committee to make a determination about the liquidator's registration. The consequences of an adverse finding can include suspension or deregistration.

91 Creditors (and other third parties with standing) can challenge the decisions of an external administrator in court and can allege breaches of the duties of external administrators as discussed above. Any sanction would be dependent on the nature of the duty breached. For example, failure to act with care and diligence as required of company directors attracts civil penalties.[97] A reckless or intentionally dishonest failure to exercise care and diligence can be a criminal offence.[98]

92 External administrators are required to maintain "adequate" professional indemnity and fidelity insurance as a condition of their

94 Corporations Act 2001 (Cth) ss 415, 427, 450A and 537; Insolvency Practice Rules (Corporations) 2016 (Cth) r 70-60.

95 Corporations Act 2001 (Cth) ss 422 and 438D.

96 Insolvency Practice Schedule (Corporations) Div 40.

97 Corporations Act 2001 (Cth) s 180.

98 Corporations Act 2001 (Cth) s 184.

registration with ASIC.[99] ASIC determines what is adequate based on a range of circumstances.[100] These insurances need to be in place before ASIC will issue a certificate of registration.[101]

93 Various other stakeholders perform supervisory roles in respect of particular insolvency processes, particularly creditors who can seek court review of the decisions of insolvency practitioners,[102] and who have various rights to receive information and participate in decision-making. Further, a committee of inspection may be created by the creditors of a company in external administration, to monitor and provide guidance to the relevant insolvency practitioner appointed throughout the external administration.[103]

94 Another level of supervision is provided by professional associations who supervise the conduct of their insolvency practitioner members and promulgate professional standards and/or codes of conduct which are binding on their members.[104] This self-regulation provides a further level of oversight in pre-insolvency and insolvency proceedings.

x *Specific issues in relation to listed companies*

95 In addition to the Corporations Act, companies listed on the ASX are regulated by the ASX Listing Rules, which are enforceable against listed entities and their associates.[105]

99 Insolvency Practice Schedule (Corporations) Div 25-1.

100 Australian Securities and Investments Commission, "Regulatory Guide 258: Registered Liquidators: Registration, Disciplinary Actions and Insurance Requirements" (March 2017) at RG 258.237– RG 258.255.

101 Australian Securities and Investments Commission, "Regulatory Guide 258: Registered Liquidators: Registration, Disciplinary Actions and Insurance Requirements" (March 2017) at RG 258.226.

102 Insolvency Practice Schedule (Corporations) Div 90.

103 Insolvency Practice Schedule (Corporations) Div 80.

104 See, for example, the Australian Restructuring Insolvency and Turnaround Association and the Turnaround Management Association.

105 Corporations Act 2001 (Cth) s 793C.

96 The ASX issues associated guidance notes, explaining the ASX's position on a particular subject. The ASX Listing Rules must be complied with, particularly continuous disclosure obligations, which become a point of focus when a company is insolvent or near-insolvent.

97 Importantly, a trading suspension does not suspend the entity's continuous disclosure obligations, which must be considered during the course of an insolvency process.

98 Other relevant considerations for listed entities facing insolvency under the ASX Listing Rules include shareholder approvals, which may be required for the issue of securities, the reorganisation of existing capital (through reconstructions and buybacks), or for an entity to dispose of its main undertaking.

B VOLUNTARY ADMINISTRATION

i *Introduction*

99 The process of voluntary administration (available to corporate debtors) is governed by Part 5.3A of the Corporations Act and begins when a voluntary administrator is appointed to a company.[106] The purpose of the voluntary administration process is to provide for the business, property and affairs of an insolvent company to be administered in a way that maximises the chances of the company continuing in existence or if that is not possible, to achieve a better return for the company's creditors and members than what would result from an immediate winding up of the company.[107]

100 A voluntary administrator is required to report to the company's creditors on his recommendation for the company. That is, whether:

(a) the company should be returned to the control of its directors (*ie*, no action);

106 Corporations Act 2001 (Cth) s 435C(1).
107 Corporations Act 2001 (Cth) s 435A.

(b) the company should be "wound up" and placed into liquidation; or
(c) a DOCA should be entered into by the company. A DOCA can (but is not required to) be proposed by a creditor, director or other interested third party, and sets out the terms of a sale or restructuring option for the business. A DOCA will ordinarily provide for the company to make a distribution to creditors from a "deed fund" in exchange for the extinguishment and release of their claims against the company. Such distribution will ordinarily result in a cents in the dollar return to the creditors.

101 The creditors vote on the three possible options at a second creditors' meeting.

ii *Appointment of a voluntary administrator*

102 A voluntary administrator can be appointed to the company by:

(a) the directors of a company, if the directors form the opinion that the company is or will likely become insolvent;[108]
(b) a secured creditor that holds security over the whole or substantially the whole of the company's property (and the security has become enforceable through some event of default);[109] or
(c) a liquidator or provisional liquidator if the liquidator thinks that the company is or is likely to become insolvent.[110]

If, at the second meeting of creditors in a voluntary administration, creditors resolve that the company should go into liquidation, the voluntary administrator becomes the liquidator unless creditors vote at the second creditors' meeting to appoint a different liquidator of their choice.[111]

108 Corporations 2001 (Cth) Act s 436A.
109 Corporations 2001 (Cth) Act s 436C.
110 Corporations 2001 (Cth) Act s 436B.
111 Corporations 2001 (Cth) Act s 446A.

103 A voluntary administrator must disclose any relevant relationships before accepting his appointment in order to mitigate potential conflicts of interest.[112]

iii *Statutory moratorium and stay*

104 Once a voluntary administrator is appointed to a company, there is a statutory moratorium that applies on all claims against the company (subject to certain limited exceptions).[113] Accordingly, except with the voluntary administrator's consent or with leave of the court (and subject to certain exceptions):

(a) an owner or lessor of property used or occupied by the company cannot recover that property;
(b) a proceeding in a court against the company cannot be continued or commenced;
(c) a secured party (other than a secured party with security over the whole or substantially the whole of the property of the company) cannot enforce its security interest against the company; and
(d) rights under contracts entered into after 1 July 2018 that are enlivened upon the company entering into voluntary administration (known as "*ipso facto*" rights) cannot be enforced (discussed further at paragraphs 108 and 109 below).

105 Importantly, a secured creditor holding security over the whole or substantially the whole of the company's property will be permitted to enforce its security by appointing a receiver to that property within 13 business days from the appointment of the voluntary administrator[114] or of the giving of notice to the secured creditor by the voluntary administrator of their appointment if required (or such later date if the administrators provide their consent to such enforcement pursuant to section 440B of the Corporations Act). Otherwise, secured creditors can only enforce their security with consent of the voluntary administrator or leave of the court.

112 Corporations 2001 (Cth) Act ss 436DA and 60.
113 Corporations 2001 (Cth) Act ss 440A–440JA.
114 Corporations Act 2001 (Cth) s 441A; "decision period" is defined in s 9.

106 A breach of the statutory moratorium/stay provisions is an offence,[115] and ASIC can initiate proceedings for a breach of the Corporations Act.[116]

107 Executory contracts are not automatically terminated by reason of the appointment of an administrator by operation of any specific law. The precise impact will depend on the terms of individual contracts.

108 For contracts entered into after 1 July 2018, there is an automatic stay on the enforcement of rights against a company which are triggered by entry into voluntary administration without the consent of the relevant appointee or the leave of the court.[117] There are extensive exemptions and exceptions to this automatic stay.[118]

109 The *ipso facto* stay does not prevent the enforcement of other rights of default or *ipso facto* contractual triggers, unless they are in substance the same as the appointment triggers.[119]

110 Additionally, with respect to specific rules regarding the treatment of utility contracts, the supplier of electricity, gas, water, or a "carriage service" (telecommunications) to a company, under the appointment of a liquidator, a provisional liquidator, an administrator, a deed administrator, a receiver or a receiver and manager, cannot terminate that contract merely by reason of those appointments or processes.[120] This restriction is in addition to the general stay in respect of the enforcement of *ipso facto* rights.

115 Corporations Act 2001 (Cth) s 1311.
116 Corporations Act 2001 (Cth) s 1315(1)(a).
117 Corporations Act 2001 (Cth) ss 415D–415G, 434J–434M and 451E–451H.
118 Corporations Regulations 2001 (Cth) reg 5.3A.50(2); Corporations (Stay on Enforcing Certain Rights) Declaration 2018 (Cth).
119 Corporations Act 2001 (Cth) ss 415D–415G, 434J–434M and 451E–451H.
120 Corporations Act 2001 (Cth) s 600F.

iv *Powers of a voluntary administrator*

111 Once appointed, a voluntary administrator assumes control of the company's business, property and affairs. The directors and officeholders lose their powers to act for or on behalf of the company.

112 If a receiver is validly appointed during the voluntary administration, the receiver will have control over the secured property and can deal with it as directed by the secured creditor. While the voluntary administrator loses his capacity to deal with the secured property, he stays in place and attends to his statutory obligations such as to hold meetings of creditors, but is unable to deal with secured property other than as directed by the receiver.

113 The voluntary administrator has all the powers of the company and its directors, including the power to remove or appoint directors, commence proceedings on behalf of the company, carry on the business and manage the business's property and affairs, and terminate and dispose of all or part of the business or its property.[121] Directors of a company under administration must assist the voluntary administrator, including by complying with the obligations described in paragraph 31(a) above.

v *Duties of a voluntary administrator*

114 Voluntary administrators are officers of the company, and as such owe to the company to which they are appointed the statutory duties of company directors and officers set out in sections 180–184 of the Corporations Act as outlined in paragraph 39 above.

115 A voluntary administrator has a duty to act in the best interests of all creditors of the company, including secured, priority, and unsecured creditors. His primary duty is to report to creditors, including providing an opinion on which of the options available regarding the creditor's vote on the future of the company (essentially, whether to end the administration, enter into a DOCA or wind up the company) is in the

121 Corporations Act 2001 (Cth) ss 437A and 442A–442F.

best interests of creditors and give reasons for the opinion.[122] This opinion is to be formed in the light of the objects mentioned in paragraph 99 above.

vi *Proposing a deed of company arrangement*

116 A DOCA, which effects a compromise with creditors of the company, is approved by the creditors of the company, voting as a single class.[123] There is no need for court approval of a DOCA.

117 The requirements of a DOCA pursuant to the Corporations Act are that it specifies:

(a) the administrator;
(b) the property of the company that is to be available to pay creditors' claims;
(c) the nature and duration of any moratorium period for which the DOCA provides;
(d) to what extent the company is to be released from its debts;
(e) the conditions (if any) for the DOCA to come into operation, and to continue in operation;
(f) the circumstances in which the DOCA terminates;
(g) the order in which the proceeds of releasing property are to be distributed among creditors bound by the DOCA; and
(h) the day (not later than the day the administration began) on or before which claims must have arisen if they are to be admissible under the DOCA.[124]

118 A DOCA is negotiated by the voluntary administrator. The statutory timetable anticipates that the process will be relatively quick and that a DOCA will be executed within around 35 business days from the appointment of the voluntary administrator.[125] This timetable can be

122 Corporations Act 2001 (Cth) s 439A–439C; Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-225(3).
123 An administrator does not need creditor approval to sell assets of the company during the voluntary administration.
124 Corporations Act 2001 (Cth) s 444A.
125 Corporations Act 2001 (Cth) ss 439A and 444B.

extended, either by a court order extending the convening period (as usually occurs in large or complex voluntary administrations, such as those involving corporate groups),[126] or by adjournment of the second meeting of creditors, which can be adjourned for up to 45 business days,[127] and longer by court order.[128]

119 The voluntary administrator is required to issue to creditors with the notice of the second meeting of creditors a report which provides information regarding:

(a) the company's financial position;
(b) details of any proposed DOCA;
(c) whether there are any transactions that appear to the administrator to be voidable transactions in respect of which recoveries may be made in a liquidation;
(d) the opinion of the administrator as to whether it is in creditors' interests for the company to execute the proposed DOCA, proceed to liquidation or be returned to the control of its directors and any other information known to the administrator as will enable the creditors to make an informed decision on this issue.[129]

120 If it is proposed that the DOCA will effectuate immediately, and the claims of creditors be transferred to a creditors' trust, then ASIC requires that specified information is included in the report.[130] The report to creditors is not required to include any third-party valuation, although the administrator will estimate the returns to creditors anticipated in any DOCA proposed, or in liquidation.[131]

121 In terms of a sale of the company's assets via DOCA, there are no specific statutory guidelines, and nor is there a requirement for court

126 Corporations Act 2001 (Cth) ss 439A(6) and 439A(7).
127 Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-140(3).
128 Corporations Act 2001 (Cth) s 447A.
129 Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-225.
130 Australian Securities and Investments Commission, "Regulatory Guide 82: External Administration: Deeds of Company Arrangement Involving a Creditors' Trust" (December 2018).
131 See *In the matter of Ten Network Holdings Ltd* [2017] NSWSC 1247 at [52]–[57].

approval other than if it is intended that the purchaser will be transferred the equity in the company for no consideration, in which case court approval is required.[132]

122 If there is a concurrent receivership, and the sale of company assets will be by the receiver, then the receiver has an obligation to achieve not less than market value for the assets, or if they have no market value, then the best price reasonably obtainable having regard to the circumstances existing when the property is sold.[133] There is no similar express duty imposed on voluntary administrators, although they are fiduciaries[134] and have the duties of directors (as discussed at paragraph 114 above).

123 Court approval is required if shares in the company (including a listed company) are to be transferred pursuant to section 444GA of the Corporations Act in a DOCA. As part of this process, ASIC requires notification of affected shareholders, including the provision of specified expert evidence,[135] specific ASIC waivers may be required,[136] and shareholders are entitled to be heard on the hearing of the deed administrators' application.[137]

124 Generally shareholder notification is not required in a voluntary administration, including in respect of a proposed DOCA.[138] However, depending on the precise terms of a DOCA, specific ASIC waivers or

132 Corporations Act 2001 (Cth) s 444GA.

133 Corporations Act 2001 (Cth) s 420A.

134 *Blundell v Macrocom Pty Ltd* (2004) 50 ACSR 549; *Re Krejci as Liquidator of Eaton Electrical Services Pty Ltd* (2006) 58 ACSR 403.

135 See Australian Securities and Investments Commission, "Regulatory Guide 111: Content of Expert Reports" (March 2011), which requires independent expert evidence be sent to affected shareholders as a condition of a waiver of the takeover requirements in s 606 of the Corporations Act 2001 (Cth) which would otherwise apply.

136 Such as in relation to s 606 of the Corporations Act 2001 (Cth) otherwise applicable to prohibit an increase in voting power above 20% where the company is listed or has more than 50 shareholders.

137 See generally *In the matter of Ten Network Holdings Ltd* [2017] NSWSC 1529.

138 Unless a shareholder can demonstrate an entitlement pursuant to s 600H of the Corporations Act 2001 (Cth).

shareholder approvals, or in the case of a listed company, ASX or shareholder approvals, may still be required.[139] However, ASX Listing Rule 11.2 applicable to the "disposal of the main undertaking" of a listed company does not apply to a sale effected via a voluntary administration/DOCA or receivership.[140]

vii *Creditor supervision*

125 In voluntary administration, creditors may be consulted via either all creditors' meetings or a committee of creditors (called a "committee of inspection"):

(a) An initial meeting of the creditors of the company (the "first meeting of creditors") is required to be convened within eight business days after the voluntary administration began. The business at that meeting is to consider whether to appoint a committee of inspection and, if so, who its members should be.[141] At the first meeting of creditors, the creditors may also resolve to remove the voluntary administrator and appoint someone else as the voluntary administrator.[142]

(b) A second meeting of the creditors of the company (the "second meeting of creditors") is required to be convened within 20 business days beginning on the day after the voluntary administration begins or the next business day if that is not a business day, and held within five business days before or after the end of that convening period.[143] The primary business of the second meeting of creditors is to resolve whether the company

139 Such as if there is a modification of the constitution (Corporations Act 2001 (Cth) s 132(2)) or a related party transaction (Corporations Act s 208).

140 See para 4.6 of the Australian Securities Exchange Listing Rules Guidance Note 12, "Significant Changes to Activities" (9 March 2018), *Brash Holdings Ltd v Shafir* (1994) 14 ACSR 192; 12 ACLC 619, and *Re Eisa Ltd* (2000) 35 ACSR 394; 18 ACLC 810; [2000] NSWSC 940.

141 Corporations Act 2001 (Cth) s 436E(1).

142 Corporations Act 2001 (Cth) s 436E(4).

143 Corporations Act 2001 (Cth) s 439A(5); the convening period is longer where the administration begins in December or in the 25 business days before Good Friday.

should execute a DOCA, be wound up or be returned to the control of its directors.[144]

(c) A voluntary administrator is obliged to convene a meeting of creditors in specified circumstances, including where directed in writing by the committee of inspection or at least 25% in value of the creditors,[145] or where directed by ASIC.[146] There is also a capacity for an external administrator to put a resolution to creditors in writing without a formal meeting.[147]

126 A creditors' meeting requires two or more creditors entitled to vote to attend in person, by proxy or attorney for there to be a quorum.[148]

127 Any party having a debt payable by, or a claim against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving to which occurred before the relevant date, is entitled to vote.[149] The chair of the meeting (usually the voluntary administrator[150]) determines eligibility for voting.[151] Where the value of a claim is unclear (such as litigation claims), then a "just estimate" needs to be made by the administrator as chair of the meeting. [152] Practically, if this is simply not possible, then the chair will usually admit the claim for a dollar. A dispute over voting entitlements can be resolved by an application to the court.

144 Corporations Act 2001 (Cth) s 439C.

145 Insolvency Practice Schedule (Corporations) Div 75-15.

146 Insolvency Practice Schedule (Corporations) Div 75-20.

147 Insolvency Practice Schedule (Corporations) Div 75-40.

148 If only one creditor is entitled to vote the quorum is one creditor: Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-105.

149 This is the formulation applicable in a winding up, pursuant to s 553 of the Corporations Act 2001 (Cth), which is applied in voluntary administration: *Brash Holdings Ltd v Katile Pty Ltd* [1996] 1 VR 24.

150 The chair must be the voluntary administrator where the meeting is a second meeting of creditors convened pursuant to s 439A of the Corporations Act 2001 (Cth): Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-50.

151 Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-85(3).

152 Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-85(4).

128 Any creditor admitted to vote is entitled to vote and has one vote.[153]

129 Voting is determined on the voices unless a poll is demanded,[154] and if a poll is demanded:

(a) a resolution is passed if a majority of creditors by number and by value vote in favour of the resolution;
(b) a resolution is not passed if the majority of creditors by number and value vote against the resolution; and
(c) in the event of a deadlock, the chair has a casting vote (except for certain resolutions relating to his remuneration and his removal).[155]

130 Creditors can attend meetings "by electronic means" if those facilities are made available but only if the convenor of the meeting considers it appropriate to use those facilities.[156]

131 Creditors have the ability to approach the court to review the voting and the court has the power to review and overturn resolutions where the outcome was determined by related entities if the outcome was contrary to the interests of creditors or has prejudiced, or is reasonably likely to prejudice, the interests of creditors who voted for or against the resolution (as the case may be) to an extent that is unreasonable.[157] The court also has the power to review the exercise of the casting vote by the chair of the meeting and set aside or vary the resolution.[158]

132 The creditors in a voluntary administration or DOCA may, at a meeting at which this issue is to be determined, determine whether

153 Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-85 (2).
154 Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-110(1).
155 Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-115.
156 Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-75.
157 Insolvency Practice Schedule (Corporations) Div 75-41.
158 Insolvency Practice Schedule (Corporations) Div 75-42

there is to be a committee of inspection and, if so, who is to be appointed to the committee.[159]

133 The specific functions of a committee of inspection are (in general terms) to advise and assist the external administrator and give directions to the external administrator. In a voluntary administration, it is common for the administrator to generally consult with the committee of inspection such as in relation to any proposed sale of the company's assets and whether an extension of the convening period for the second meeting of creditors should be sought.

134 Some matters can be determined by either the creditors or the committee of inspection, including the approval of the external administrators' remuneration,[160] the approval in liquidation of the compromise of a debt owed to the company of more than A$100,000[161] or the entry by the liquidator into a contract of greater than a three-month duration.[162]

135 There are specific entitlements for the appointment to the committee of inspection of a creditor or creditors representing 10% of more of the value of the company's creditors,[163] and for an employee or employees representing 50% or more of the value of entitlements owed to employees,[164] as well as specific provision for a consolidated committee of inspection applicable to pooled groups being wound up.[165]

136 To be eligible for appointment to the committee of inspection, a person must be a creditor of the company, the attorney of a creditor of the company, authorised in writing by a creditor of the company or a representative of the Commonwealth, if FEG claims have been made or are likely to be made in relation to the payment of employee

159 Insolvency Practice Schedule (Corporations) Div 80-5.
160 Insolvency Practice Schedule (Corporations) Div 60-10.
161 Corporations Act 2001 (Cth) s 477(2A); Corporations Regulations 2001 (Cth) reg 5.4.02.
162 Corporations Act 2001 (Cth) s 477(2B).
163 Insolvency Practice Schedule (Corporations) Div 80-20.
164 Insolvency Practice Schedule (Corporations) Div 80-25.
165 Insolvency Practice Schedule (Corporations) Div 80-26.

entitlements.[166] Unless creditors resolve otherwise, it is a strict liability offence for a committee member:

(a) to directly or indirectly derive any profit or advantage from the external administration of the company;[167] or
(b) representing more than 10% in value of the company's creditors to directly or indirectly become the purchaser of any part of the property of the company.[168]

137 A member of a committee of inspection may, if the committee so resolves, obtain specialist advice or assistance on behalf of the committee but may only incur an expense in relation to that advice or assistance with the approval of the external administrator.[169] It is not common in Australia that a committee of inspection receives external advice.

viii *Ranking of creditor claims in voluntary administration and deed of company arrangement*

138 In order to qualify as a "creditor" in the voluntary administration of a company, a party must lodge details of its debt or claim with the voluntary administrator by completing and lodging a proof of debt. All creditors with provable claims, whether they are secured or not, are entitled to lodge a proof of debt and, if their claim is admitted for voting purposes, to vote to decide the fate of the company.

139 Creditor claims are not substantively dealt with in voluntary administration, other than in a summary way for voting purposes, but only once the company proceeds to either DOCA or liquidation.

140 In terms of creditor priority in a DOCA:

(a) Secured creditors will not be bound by the terms of a DOCA if they do not vote in favour of it, and otherwise will be free to enforce their security unless the DOCA provides otherwise and

166 Insolvency Practice Schedule (Corporations) Div 80-5.
167 Insolvency Practice Schedule (Corporations) Div 80-55.
168 Insolvency Practice Schedule (Corporations) Div 80-60.
169 Insolvency Practice Schedule (Corporations) Div 80-50.

the secured creditor voted in favour of the DOCA.[170] For this reason, a DOCA is usually only proposed in circumstances where the secured creditor's interests are accommodated. A secured creditor is entitled to vote in a voluntary administration for the full amount of its debt without having to deduct the value of its security interest.

(b) Although there is no specific statutory provision requiring it, a DOCA will generally include the liquidation priority to a creditor with a claim against the company that is subject to an insurance policy,[171] with the effect that the creditor is entitled to receive the net proceeds of the insurance policy in priority to other unsecured creditors.

(c) The terms of the DOCA must reflect at least the liquidation priority for eligible employee entitlements[172] discussed above, unless the relevant employee creditors have resolved, or the court has ordered, otherwise.[173] Variation of the liquidation priority for eligible employee entitlements often occurs where the business continues to trade and the company intends to pay out eligible employee entitlements in the ordinary course of business, rather than pay or compromise them through the DOCA.

(d) Although pre-commencement unsecured creditors are otherwise generally afforded equal treatment in a DOCA, it is possible to treat the non-preferred unsecured creditors (such as non-continuing suppliers) on a differential basis so long as the DOCA is not unfairly prejudicial to or unfairly discriminatory against one or more creditors. In assessing this, the court considers, amongst other things, whether there is a legitimate rationale for differential treatment of creditors, and whether the differentiation is based on reasonable grounds.[174]

170 Corporations Act 2001 (Cth) s 444D(2).

171 Corporations Act 2001 (Cth) s 562.

172 Corporations Act 2001 (Cth) ss 433 and 561.

173 Corporations Act 2001 (Cth) s 444DA.

174 Corporations Act 2001 (Cth) s 445D(1)(f); *Lam Soon Australia Pty Ltd v Molit (No 55) Pty Ltd* (1996) 70 FCR 34.

ix *Termination of a deed of company arrangement*

141 A DOCA may be terminated in four ways:

(a) First, a DOCA may be terminated following the performance of its terms.[175] In this case, the deed administrator needs to complete statutory certification and notification obligations to give effect to the termination.[176]

(b) Second, a DOCA may be terminated by creditors at a meeting if the creditors pass a resolution to that effect.[177] However, creditors are not entitled to pass such a resolution unless there has been a breach of the DOCA which has not been rectified before the resolution is passed.[178] The company will be wound up if liquidation is proposed in the notice of meeting.[179] In this case, the deed administrator becomes the liquidator.[180]

(c) Third, the court has the power to terminate a DOCA in certain circumstances.[181] These circumstances include if it is satisfied that:

(i) information given to the administrator or creditors about the company's business, property, affairs or financial circumstances was false or misleading or could reasonably be expected to have been material to the creditors in deciding whether to vote in favour of the resolution that the company execute the DOCA;[182]

(ii) such information was contained in a document accompanying the notice of the meeting at which the DOCA was passed;[183]

175 Corporations Act 2001 (Cth) ss 445C(d) and 445FA.
176 Corporations Act 2001 (Cth) s 445FA(1).
177 Corporations Act 2001 (Cth) s 445C(b).
178 Corporations Act 2001 (Cth) s 445CA.
179 Corporations Act 2001 (Cth) s 445E.
180 Corporations Act 2001 (Cth) s 446A(1)(c).
181 Corporations Act 2001 (Cth) ss 445C(a) and 445D.
182 Corporations Act 2001 (Cth) s 445D(1)(a).
183 Corporations Act 2001 (Cth) s 445D(1)(b).

(iii) if there was an omission from such a document which omission can reasonably be expected to have been material to creditors;[184]

(iv) there has been a material contravention of the DOCA by a person who is bound by it;[185]

(v) the DOCA cannot be given effect without injustice or undue delay;[186] or

(vi) the DOCA (or any provision in it or any act or omission relating to it) would be oppressive or unfairly prejudicial to or unfairly discriminatory against a creditor or contrary to the interests of the creditors as a whole.[187]

A creditor, the company, ASIC or any other interested person may apply to the court to terminate a DOCA.[188] If an order terminating the DOCA is made, the company will automatically transition to liquidation and the deed administrator will become the liquidator.[189]

(d) Fourth, if the DOCA specifies circumstances in which it is to terminate, the DOCA will terminate if those circumstances exist.[190] If the DOCA also specifies that in those circumstances, the company is to be wound up, the company will automatically transition to liquidation and the deed administrator will become the liquidator.[191]

142 If a company fails to execute the approved DOCA within 15 business days after the end of the meeting of creditors approving

184 Corporations Act 2001 (Cth) s 445D(1)(c).

185 Corporations Act 2001 (Cth) s 445D(1)(d).

186 Corporations Act 2001 (Cth) s 445D(1)(e).

187 Corporations Act 2001 (Cth) s 445D(1)(f). For example, in certain circumstances a deed of company arrangement ("DOCA") that does not provide for equal treatment of unsecured creditors could be terminated on this ground: *Lam Soon Australia Pty Ltd v Molit (No 55) Pty Ltd* (1996) 70 FCR 34. A DOCA can also be set aside on this ground if secret payments are made to select creditors to induce them to vote in favour of the DOCA: *Young v Sherman* (2002) 170 FLR 86.

188 Corporations Act 2001 (Cth) s 445D(2).

189 Corporations Act 2001 (Cth) s 446AA(1)(a).

190 Corporations Act 2001 (Cth) s 445C(c).

191 Corporations Act 2001 (Cth) s 446AA(1)(b).

entry into the DOCA or such longer period allowed by the court on an application made within that period, the company will automatically transition to liquidation and the voluntary administrator will become the liquidator.[192]

x *Expenses and remuneration of a voluntary administrator*

143 The voluntary administrator has a statutory indemnity out of the company's property for:

(a) debts or liabilities incurred by the voluntary administrator, including:
    (i) debts or liabilities for which the voluntary administrator is personally liable pursuant to the Corporations Act, being for services rendered, goods supplied, property hired, leased, used or occupied, the repayment of money borrowed, interest in respect of money borrowed and borrowing costs;[193]
    (ii) specified tax obligations for which the voluntary administrator is liable;[194] and
    (iii) any other debts or liabilities incurred, or damages or losses sustained, in good faith and without negligence by the voluntary administrator in the performance of his functions or powers;[195] and
(b) the voluntary administrator's remuneration.[196]

144 Generally, the indemnity has priority over all of the company's unsecured debts, and debts of the company secured by a "circulating

192 Section 444B(2) read together with s 446A(1)(b) of the Corporations Act 2001 (Cth).
193 Corporations Act 2001 (Cth) s 443A.
194 Corporations Act 2001 (Cth) s 443D(a)
195 Corporations Act 2001 (Cth) s 443D(aa).
196 Corporations Act 2001 (Cth) s 443D(b).

security interest" in the property of the company.[197] The indemnity does not have priority where:[198]

(a) the secured creditor commenced enforcement prior to the administration which enforcement continues;
(b) enforcement commences during the administration; or
(c) in respect of the repayment of moneys borrowed by the administrator, or interest or costs of that borrowing.

The voluntary administrator's statutory indemnity is supported by a statutory lien.[199]

145 Voluntary administrators are entitled to remuneration for necessary work properly performed, in accordance with the remuneration determination made by resolution of the creditors, a committee of inspection (if there is one), or by the court.[200] If no determination is made, the voluntary administrator is only entitled to be paid reasonable fees up to the maximum default amount.[201] These fees are paid out of the assets of the company, with priority.[202]

C SCHEMES OF ARRANGEMENT

i *Introduction*

146 A scheme of arrangement is a formal procedure used in Australia, derived from the English Scheme, to compromise the rights of

197 Corporations Act 2001 (Cth) s 433E(1).
198 Corporations Act 2001 (Cth) s 443E.
199 Corporations Act 2001 (Cth) s 443F.
200 Insolvency Practice Schedule (Corporations) Divs 60-5–60-10.
201 Insolvency Practice Schedule (Corporations) Div 60-15. The maximum default amount for appointments during the financial year beginning 1 July 2016 is A$5,000. For appointments on or after 1 July 2017, the maximum default amount is the greater of the amount worked out by multiplying the index factor for the financial year by the maximum amount for the previous year or the amount prescribed.
202 Corporations Act 2001 (Cth) s 556(1).

creditors and/or shareholders, and is regulated by Part 5.1 of the Corporations Act.[203]

147 The Corporations Act does not distinguish between pre-insolvency and formal insolvency in so far as the availability of the scheme of arrangement process to deal with debtors experiencing financial difficulties is concerned. Having said this, schemes of arrangement are typically utilised as a formal pre-insolvency option, *ie*, as an option to be implemented before the board resorts to its ability to appoint a voluntary administrator.

148 Schemes are a court-driven process involving a proposal that is put forward to restructure a company in a manner that includes a compromise of the rights of its shareholders (known as a "members scheme") or its creditors (known as a "creditors scheme").[204] This Jurisdictional Report focuses on creditors' scheme of arrangement ("Schemes") which are used to compromise the claims of creditors or certain classes of creditors.

149 Schemes can be restricted to certain classes of creditors and will only bind the specific class or classes of creditors subject to the Scheme, such as only secured creditors. Accordingly, it is possible to be more targeted than in a DOCA. The number of classes necessary in a Scheme will depend on the circumstances of the individual case.

150 Schemes are very flexible documents and their exact nature and effect will depend on the Scheme terms. That being said, a Scheme can involve a moratorium on claims against the debtor company and a compromise of debts owed by that company. The procedure for implementing a Scheme is complex and requires two court approvals.

ii *The creditors' scheme of arrangement procedure*

151 Either affected creditors or the company can initiate discussions and make a proposal for a Scheme. A Scheme is required to be proposed

203 Corporations Act 2001 (Cth) s 411.
204 Corporations Act 2001 (Cth) Pt 5.1.

formally by the company – typically pursuant to a majority resolution of the board of directors. This will occur after a Scheme implementation deed has been agreed between the company and the affected creditors.

152 While the debtor drives and is required to formally instigate the Scheme, control will depend on the arrangements between the debtor and its creditors, but a Scheme must ultimately be approved by affected creditors.

153 In a Scheme, as required by section 411 of the Corporations Act:

(a) The court (at the "first court hearing") must convene a meeting or meetings at which creditors, or classes of creditors, will vote on the Scheme. The court will not convene a meeting of creditors, or of a class of creditors, to vote on the Scheme at the first court hearing unless the Scheme is such that, if it is approved by the creditors, or the classes of creditors, at the meeting, the court would be likely to approve the Scheme at the second court hearing if it was unopposed.[205] Creditors and ASIC can be represented at the first court hearing. Issues going to the appropriateness of the "class composition" of the proposed Scheme will generally be agitated at the first court hearing.[206]

(b) The resolution in favour of the Scheme is passed by a majority in number of the creditors, or of the creditors in the relevant class, at that meeting either in person or by proxy. That present and voting majority in number must also represent creditors whose debts or claims against the company amount in the aggregate to at least 75% of the total amount of the debts and claims of the creditors, or creditors in the relevant class, present and voting in person or by proxy. In a Scheme, the chair of the meeting determines eligibility for voting.[207]

(c) The court has a discretion to approve the Scheme at what is called the "second court hearing", held after the creditors' vote

205 *FT Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* (1977) 3 ACLR 69 at 72; *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at [8]–[10]; *Centrebet International Ltd* [2011] FCA 870 at [29].

206 *Re Prime Infrastructure Holdings Ltd* (2010) 80 ACSR 193 at [17].

207 Corporations Act 2001 (Cth) s 411(4).

> whether or not to approve a Scheme, even if the requisite statutory majority is achieved. Creditors and ASIC can be represented at the second court hearing. In exercising its discretion whether to approve the Scheme at the second court hearing, the court will usually approach the matter on the basis that the creditors are the best judges of their own commercial interests. The matters that the court will consider in exercising the discretion include the adequacy of the procedural steps undertaken, the adequacy of disclosure, compliance with statutory and public policy imperatives, whether the Scheme has been proposed in good faith and whether it is fair and reasonable.[208]

154 The court cannot amend a Scheme after it has been approved.[209] However, the court does have the power to amend a Scheme as it thinks just as part of the grant of approval or make the Scheme subject to such conditions as it thinks just.[210] Generally, this power is exercised to correct minor errors and oversights, or the impact of uncontroversial subsequent developments, usually at the initiative of the debtor company. While it has been considered that any such amendments should be substantially consistent with what the creditors agreed,[211] there is recent authority to the effect that the court is empowered to make amendments that are more significant, and even despite the company's objection.[212]

155 Orders made by the court in relation to a Scheme and court approval of a Scheme can be appealed by a creditor or an affected third

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208 This is not an exhaustive list, but is indicative of the substantive matters of the extensive schemes jurisprudence; see generally *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601; *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213; *Re NRMA Ltd (No 2)* (2000) 34 ACSR 261 and *Re Central Pacific Minerals NL* [2002] FCA 239.

209 *Re Challenger Group Holdings Ltd* (2003) 48 ACSR 498 at [18]; however, the court has made minor amendments on a "slip rule" basis, *ie*, for clear errors or omissions.

210 Corporations Act 2001 (Cth) s 411(6); *Re Matine Ltd* (1998) 28 ACSR 268.

211 *Re Opes Prime Stockbroking Ltd (No 2)* (2009) 73 ACSR 411; [2009] FCA 864 at [16]–[17].

212 *Snowside Pty Ltd as trustee for the Snowside Trust v Boart Longyear Ltd* (2017) 122 ACSR 291; [2017] NSWCA 215.

party. However, any party looking to appeal opposing the Scheme will seek an immediate interim injunction at the second court hearing preventing the debtor company from lodging the order of the court with ASIC, at which point the Scheme becomes effective[213] (and from which time any appeal is likely to become nugatory due to the intervening impact on third-party rights).[214]

156 Once a Scheme is effective, it binds all creditors in the relevant class or classes, irrespective of whether the creditors voted against the Scheme, whether they elected to vote at all, and even if they did not receive notice.[215]

157 If a Scheme is defeated by a creditors' vote, there is no automatic resulting process that occurs. If the vote in favour of a Scheme does not succeed, or does not succeed in respect of a class or classes of creditors in respect of which the Scheme in relation to the remainder of affected classes is interdependent, or if the Scheme is not approved by the court at the second court hearing, then the Scheme will not proceed, and:

(a) if a liquidator was proposing the Scheme, then the company will remain in liquidation; and
(b) if the company was not in any form of insolvency process, then it will remain under the control of its directors. However, assuming the company is, or is likely to become insolvent, then the directors will need to consider proposing an alternate Scheme, appointing a voluntary administrator to the company, or resolving to wind up the company.

158 A Scheme administrator may, but is not required to, be appointed to administer the Scheme. The Scheme administrator's powers to deal with corporate assets are contained in, and may be limited by, the Scheme itself. Similarly, the manner and method of distribution of funds under a Scheme will be governed by the provisions of the Scheme itself. The commencement of a Scheme does not of itself deprive secured

213 Corporations Act 2001 (Cth) s 411(10).
214 See *Re Centro Properties Ltd and CPT Manager in its capacity as responsible entity of Centro Property Trust* [2011] NSWSC 1481.
215 Corporations Act 2001 (Cth) s 411(4).

creditors of their rights under their securities, although the terms of the Scheme – once approved and implemented – may do so.

159 There is no specific timetable applicable in a Scheme, although generally the interested parties are concerned to move as quickly as possible once the terms of the Scheme are agreed, to hold the first court hearing to convene the meeting of creditors to vote on the Scheme, to hold that meeting and then (assuming the vote is successful) to have the court approve the Scheme at the second court hearing.

160 There are no specific statutory provisions in relation to the costs and expenses of the Scheme process or Scheme administrator, including his remuneration, although such costs and expenses will typically be given priority under the Scheme terms over pre-commencement creditor claims.

iii *Creditors' scheme of arrangement documentation*

161 In a Scheme, extensive information is required to be provided to creditors before they vote on a proposed Scheme. The company is obliged to issue to creditors a detailed explanatory statement,[216] the despatch of which is approved by the court at the first court hearing. The explanatory statement discloses the details of the Scheme to creditors, and must set out: [217]

(a) the anticipated dividend that would be expected to be available if the company were to be wound up within six months;
(b) the expected dividend that is expected to be paid under the Scheme; and
(c) a list of the names of all known Scheme creditors and the debts owed to those creditors (including identification of any guaranteed creditors and any "internal" creditors),[218]

216 Corporations Act 2001 (Cth) s 412.
217 Corporations Regulations 2001 (Cth) Schedule 8 reg 8201.
218 Being shareholders, their relatives and spouses and relatives of their spouses: Corporations Regulations 2001 (Cth) Schedule 8 reg 8101.

and includes prescribed annexures, such as a report on the company's affairs.[219]

162 The explanatory statement is not required to include any third-party valuation, but it can do if desired by the company.

163 Although there are extensive statutory requirements in relation to the explanatory statement to be despatched to creditors in relation to a Scheme, there are no specific provisions pertaining to the content of the Scheme document itself.

164 The explanatory statement must be provided to ASIC at least 14 days prior to lodgement with the court.[220] If approved at the first court hearing, a notice convening the meeting must be distributed to members and be accompanied by the explanatory statement.[221]

165 After the court-ordered meeting, the applicant must publish a notice of hearing of the application to approve the proposed Scheme.[222] The form of the notice of hearing and the timing of its publication (at least five days prior to the hearing) are prescribed.[223]

166 All notices lodged with ASIC, as required under the Corporations Act and the Corporations Regulations, are published on a public online database maintained by ASIC.[224] The Scheme administrator is also

219 Corporations Regulations 2001 (Cth) Schedule 8 reg 8203.

220 Corporations Act 2001 (Cth) s411(2).

221 Corporations Act 2001 (Cth) s412(1); the orders made at the first court hearing will deal with the mechanics of notice to creditors, which is increasingly done electronically.

222 Publication of the notice of hearing is typically once in a daily newspaper circulating in the state or territory where the company has its principal place of business: see, for example, r 2.12 of the Federal Court (Corporations) Rules 2000 (Cth).

223 See, for example, Federal Court (Corporations) Rules 2000 (Cth) r 3.4 and Schedule 1 Form 6.

224 Australian Securities and Investments Commission, "Published notices" <https://insolvencynotices.asic.gov.au/> (accessed 10 January 2020).

required to lodge with ASIC all particulars relevant to their appointment.[225]

167 Generally, shareholder notification is not required in respect of a creditors' Scheme.[226] However, depending on the precise terms of a Scheme, specific ASIC waivers or shareholder approvals, or in the case of a listed company, ASX or shareholder approvals, may still be required.[227]

iv *Creditor supervision*

168 In a Scheme, there is a single court-ordered meeting of creditors (or a class of creditors) to vote on the proposed compromise or arrangement. All creditors in the relevant class or classes are entitled to vote on the proposed Scheme, where the relevant creditors are defined by the terms of the Scheme.

169 The meeting mechanics are ordered by the court and will be based on the external administration mechanics (discussed at paragraphs 125–130 above in the context of voluntary administration) with some modifications.

170 As discussed at paragraphs 153–155 above, creditors can be represented at the first and second court hearings in relation to the Scheme, and can appeal against the orders made by the court at those hearings.

225 Corporations Act 2001 (Cth) ss 411(9) and 415.

226 See, for example, *Re Opes Prime Stockbroking Pty Ltd (No 1)* (2009) 258 ALR 362; 73 ACSR 385 at [76]; there is an exemption from s 606 of the Corporations Act 2001 (Cth) for a change of control by creditors' scheme of arrangement: see also Corporations Act s 611 at item 17.

227 Such as if there is a modification of the constitution (Corporations Act 2001 (Cth) s 136(2)) or a related party transaction (Corporations Act s 208) or in relation to a disposal of "main undertaking" pursuant to Australian Securities Exchange Listing Rule 11.2.

v *Ranking of creditor claims in a creditors' scheme of arrangement*

171 There are no specific statutory provisions in relation to the priority of pre-commencement creditors in a Scheme.

172 A Scheme usually only deals with one, or sometimes more classes of creditors, and it is not usually the case that claims of other classes of creditor are compromised but rather they are paid in the ordinary course subsequent to the Scheme's implementation.

173 Generally, employee claims are not compromised in a Scheme such as to require any consideration of the treatment of eligible employee entitlements. Employees whose entitlements are affected by a Scheme must be treated as a separate class for the purposes of meetings to approve the Scheme.[228] Although the provisions providing priority for employee entitlements in liquidation do not, strictly, apply in a Scheme, it is likely that if the Scheme involved any compromise of employee claims (which would be unusual), the statutory priorities would be reflected.

vi *Implementation of a creditors' scheme of arrangement*

174 Whilst a Scheme is being formulated and put to creditors (and also after its implementation), management and control of the company's business will depend on the agreement reached with creditors. Typically, pre-existing management remains in control of the company and company officers continue to be able to exercise all powers unless otherwise agreed with creditors (*eg*, restrictions on actions may be agreed in a standstill or restructuring co-ordination deed).

175 The Scheme will set out the mechanics for adjudicating creditor claims. The mechanics tend to be bespoke, depending on the class (or classes) of creditor subject to the Scheme. The insolvency office-holder (being the Scheme administrator) adjudicates on the claims.

228 *Re Brian Cassidy Electrical Industries Pty Ltd* (1984) 9 ACLR 140.

176 As with voluntary administration, executory contracts are not automatically terminated by reason of the company entering into a Scheme, by operation of any specific law. The precise impact of the process will depend on the terms of the individual contract. The moratorium on the enforcement of "*ipso facto*" rights (and its exemptions and exceptions) described in paragraph 104(d) in the context of voluntary administration also applies in relation to particular rights arising because the company has proposed or entered into a scheme of arrangement but only if the application in respect of the proposed scheme of arrangement states that it is being made for the company avoiding being wound up in insolvency.

177 Under the terms of a Scheme, a stay or moratorium is likely to arise once the Scheme has been implemented in relation to claims or rights compromised or modified by the Scheme. Orders can be obtained from the court before the Scheme is approved and implemented which have the effect of a stay or moratorium in relation to proceedings against the company pending approval. The impact of a stay or moratorium in relation to a Scheme will depend on the terms of the Scheme.

D RECOGNITION OF FOREIGN INSOLVENCY PROCEDURES IN AUSTRALIA

i *Introduction*

178 There are two key ways in which foreign insolvency proceedings can be recognised in Australia. The first is pursuant to the provisions of the CBI Act, which gives force to the Model Law in Australia.[229] The second is pursuant to the "aid and auxiliary" provisions contained in section 581 of the Corporations Act,[230] pursuant to which Australian

229 Section 22 of the Cross-Border Insolvency Act 2008 (Cth) provides that to the extent of any inconsistency, the Model Law prevails over the Corporations Act 2001 (Cth).

230 Bankruptcy Act 1966 (Cth) s 29, which governs personal insolvency, contains an equivalent provision to s 581 of the Corporations Act 2001 (Cth).

courts can, and must in respect of certain jurisdictions, render assistance to foreign insolvency courts.

179 Recognition of foreign insolvency proceedings in accordance with the methods set out above does not strictly allow for the powers of an insolvency practitioner under a foreign jurisdiction to be exercised in Australia. However, it enables the foreign insolvency practitioner to apply to approach the courts in Australia for relief, including for orders for the protection of a debtor company's assets from creditors, and to enable the foreign insolvency practitioner to exercise powers over the debtor company's assets in Australia that he would have otherwise been afforded if the insolvency process was being undertaken in Australia (pursuant to Australian law).

180 In most cases, the Model Law as enacted in the CBI Act is the most simple, comprehensive and certain means by which to have a foreign insolvency proceeding recognised in Australia and for the foreign insolvency practitioner to exercise powers over the debtor company's assets in Australia. This would typically be the preferred approach. However, as the Model Law is in addition to, and not in derogation of, the procedures in the Corporations Act, section 581 may be utilised in circumstances where the Model Law does not apply.

181 In this Part, capitalised terms have the meanings ascribed to them in the Model Law.

ii *Adoption of UNCITRAL Model Law on Cross-Border Insolvency*

182 The Model Law allows for recognition of insolvency proceedings opened in foreign states unless this would be manifestly contrary to the public policy of Australia.[231] The CBI Act enacts the Model Law in full as a schedule "with as few changes as are necessary to adapt it to the Australian context".[232] In terms of differences from the standard Model

231 We do not address here the recognition in Australia of foreign judgments more broadly, but limit our consideration to the recognition of insolvency proceedings.

232 Cross-Border Insolvency Bill 2008 Explanatory Memorandum at p 6.

Law, the CBI Act provides[233] that the alternate footnote will apply for the purposes of paragraph 2 of Article 13 of the Model Law, with the effect that the claims of foreign creditors, "other than those concerning tax and social security obligations", must not be ranked lower than the unsecured claims of other creditors solely because the creditor concerned is a foreign creditor.

183 Under the Model Law, a properly appointed Foreign Representative can apply for a foreign insolvency procedure to be recognised by an Australian court, as either:

(a) a Foreign Main Proceeding, namely, a proceeding that was commenced in the country in which the debtor has its centre of main interests ("COMI"); or
(b) a Foreign Non-main Proceeding, namely, a Foreign Proceeding that was commenced in a country where the debtor does not have its centre of main interests but has an "establishment".[234]

184 The explanatory memorandum to the CBI Act makes clear that the definition of Foreign Proceeding is intended to refer broadly to proceedings involving companies in severe financial distress[235] and Australian courts have recognised that the definition of Foreign Proceeding is broad enough to extend to liquidations arising from insolvency as well as creditor's voluntary winding-up procedures, reconstructions and reorganisations, administrations and voluntary administrations (see examples in section iv of this Part).

185 In order to have a Foreign Proceeding recognised in Australia pursuant to Article 15 of the Model Law,[236] the Foreign Representative must make an application to the Federal Court of Australia or a Supreme Court of a state or territory, which names the Foreign

233 Cross-Border Insolvency Act 2008 (Cth) s 12.

234 Defined in Art 2(f) of the Model Law as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services".

235 Cross-Border Insolvency Bill 2008 Explanatory Memorandum Art 2 "Definitions" at p 17.

236 See *Weinstein (Trustee) v Morris* [2016] FCA 993 for an overview of the applicable procedural requirements in a recognition of a US Foreign Proceeding in Australia.

Representative as the plaintiff and the debtor company as the defendant.[237] This application must be made in the form of an originating process in accordance with Form 2 of the Corporations Rules.[238] It should be filed with the court together with an interlocutory process seeking directions as to service[239] and any interlocutory process seeking provisional relief under Article 19 of the Model Law.[240]

186 The application must be accompanied by certain information and evidence including evidence of the commencement of the Foreign Proceeding and the appointment of the Foreign Representative,[241] a statement setting out all the Foreign Proceedings in which the debtor company is named that are known by the Foreign Representative, a statement in relation to the existence of any other Australian insolvency proceedings known to the Foreign Representative[242] and an affidavit verifying these matters (being matters mentioned in paragraphs 2 and 3 of Article 15 of the Model Law and in section 13 of

237 Federal Court (Corporations) Rules 2000 (Cth) r 15A.3(2)(b).

238 We have referred to the Federal Court (Corporations) Rules 2000 (Cth) in this report, but the Supreme Courts of the various states and territories of Australia have Corporations Rules in the same terms.

239 Federal Court (Corporations) Rules 2000 (Cth) rr 15A.3(1) and 15A.3(3).

240 Federal Court (Corporations) Rules 2000 (Cth) r 15A.4.

241 Being a certified copy of the decision commencing the Foreign Proceeding and appointing the Foreign Representative, or a certificate from the Foreign Court affirming the existence of the Foreign Proceeding and of the appointment of the Foreign Representative, or otherwise evidence acceptable to the Court of the existence of the Foreign Proceeding and the appointment of the Foreign Representative: Model Law Art 15(2)(a) and Federal Court (Corporations) Rules 2000 (Cth) r 15A.3(2)(c).

242 Model Law Art 15, Cross-Border Insolvency Act 2008 (Cth) s 13; Federal Court (Corporations) Rules 2000 (Cth) r 15A.3(2)(c); this extends to any proceeding under the Bankruptcy Act 1966 (Cth) (concerned with personal bankruptcy), the appointment of a receiver, controller or managing controller to the property of the debtor company and any proceedings under Chapter 5 of the Corporations Act Corporations Act 2001 (Cth) ("Corporations Act") (which governs all insolvency processes as well as creditors' schemes of arrangement), s 601CL of the Corporations Act (dealing with the cessation of business of a registered foreign company) or the Insolvency Practice Schedule (Corporations) of the Corporations Act.

the CBI Act).[243] The application and affidavit must be served on the debtor company at least five days before the date listed for hearing.[244]

187 In addition, the CBI Act requires that a statement in relation to the existence of any other Australian insolvency proceedings known to the Foreign Representative accompany any application for recognition in Australia[245]. It further requires that in addition to the obligation under Article 18 sub-paragraph (b) for the Foreign Representative to promptly inform the court of any other Foreign Proceeding that the Foreign Representative becomes aware of, the Foreign Representative also inform the court promptly of any other Australian insolvency proceedings that become known to the Foreign Representative.[246]

188 Unless the court otherwise orders, the Foreign Representative must also cause a notice of filing of the application for recognition to be sent to each person whose claim to be a creditor of the debtor is known to the applicant[247] and notice to be published in a daily newspaper circulating generally in the state or territory where the debtor has its principal, or last known, place of business.[248] Any person who intends to appear at the hearing of the application must file and serve[249] a notice of appearance in the prescribed form, and any affidavit on which he intends to rely, not later than three days before the date of the hearing.[250]

189 Upon the making of an order of recognition, the Foreign Representative must, as soon as practicable, have the order entered,[251]

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243 Federal Court (Corporations) Rules 2000 (Cth) r 15A.3(2)(c).
244 Federal Court (Corporations) Rules 2000 (Cth) rr 15A.3(4) and 2.7(1).
245 Cross-Border Insolvency Act 2008 (Cth) s 13.
246 Cross-Border Insolvency Act 2008 (Cth) s 14.
247 Federal Court (Corporations) Rules 2000 (Cth) r 15A.6(1)(a).
248 Federal Court (Corporations) Rules 2000 (Cth) r 15A.6(1)(b).
249 Federal Court (Corporations) Rules 2000 (Cth) r 15A.3(5).
250 Federal Court (Corporations) Rules 2000 (Cth) r 2.9(1).
251 Federal Court (Corporations) Rules 2000 (Cth) r 15A.7(1)(a). Rule 39.34 of the Federal Court Rules 2011 (Cth) provides that the court may direct that an order be entered by the order being authenticated in court, in accordance with r 39.35(1), at the time the order is made. This invoices the court or a registrar signing the order and a seal or stamp of a district registry being affixed to the order.

serve a copy of the entered order on the debtor,[252] send a notice of the making of the order in the prescribed form sent to each person whose claim to be a creditor is known to the applicant[253] and publish a notice of the making of the order in accordance with the relevant form, in a daily newspaper circulating generally in the state or territory where the debtor has its principal place of business.[254]

a Recognition and relief

190 Once an Australian court has recognised a Foreign Proceeding, the Foreign Representative is able to seek a range of orders from the court to assist in carrying out the reorganisation or liquidation of a debtor company's assets. The specific consequences and remedies that follow from recognition vary depending on whether the procedure is recognised as a Foreign Main or a Foreign Non-main Proceeding.

191 Article 20 of the Model Law provides for certain automatic effects upon recognition of a Foreign Proceeding as a Foreign Main Proceeding, namely:

(a) a stay on commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;
(b) a stay on execution against the debtor's assets; and
(c) suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor.

192 The nature of the automatic stay that applies under Article 20 of the Model Law is determined by the provisions of the Corporations Act applicable to the insolvency procedure that the Foreign Proceeding most closely resembles. However, if a broader stay is required, further orders can be sought under Article 21 of the Model Law.

193 Article 21 of the Model Law empowers Australian courts to grant additional relief on a discretionary basis upon recognition of either

252 Federal Court (Corporations) Rules 2000 (Cth) r 15A.7(1)(b).
253 Federal Court (Corporations) Rules 2000 (Cth) r 15A.7(1)(c).
254 Federal Court (Corporations) Rules 2000 (Cth) r 15A.7(1)(d).

a Foreign Main or Foreign Non-main Proceeding. Pursuant to Article 21, where necessary to protect the assets of the debtor or the interests of the creditors, the court may grant any appropriate relief including, but not confined to, the relief set out in sub-paragraphs (a)–(g), at the request of the Foreign Representative. Relevantly for the purposes of this Jurisdictional Report, such relief can take the form of, *inter alia*:

(a) staying the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under Article 20;
(b) staying execution against the debtor's assets to the extent it has not been stayed under Article 20;
(c) suspending the right to transfer, encumber or dispose of any assets of the debtor to the extent this right has not been suspended under Article 20;
(d) providing for the examinations of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
(e) entrusting the administration or realisation of all or part of the debtor's assets to the Foreign Representative;
(f) an extension of the injunctive relief available under Article 19 upon the filing of an application for recognition; and
(g) granting any further relief that might be available to an insolvency practitioner in domestic proceedings.

194 While there are no automatic consequences arising from the recognition of a Foreign Non-main Proceeding, pursuant to Article 21, the court can grant relief similar to that in Article 20 on a discretionary basis.

b Relevant decisions

195 Pursuant to the discretion afforded under Article 21 of the Model Law, Australian courts have shown an inclination towards granting Foreign Representatives the same protections and powers as would be available as a matter of course if the insolvency procedure was occurring under Australian law.

196 In *Tucker v Aero Inventory (UK) Ltd (No 2)*,[255] the Federal Court found that a UK administration should be recognised as a Foreign Main Proceeding and the UK administrators were granted the same protections with respect to charges, liens and pledges and leased property as the voluntary administrator of an Australian company would have as a matter of course. In addition, the Australian assets of the company, comprised of property owned or controlled by the company, including numerous consumable and expendable parts for commercial aircraft, were distributed and sold as part of the company's business.

197 In *Ackers v Saad Investments Co Ltd*,[256] the liquidators of Saad Investments ("Saad"), a company incorporated in the Cayman Islands, made an application for recognition in Australia of proceedings of the Grand Court of the Cayman Islands, in which orders were made for the winding up of Saad and appointment of the plaintiffs as joint official liquidators, as a Foreign Proceeding under the Model Law. Saad held assets in Australia, being equities listed on the ASX, a large majority of which were the subject of unresolved claims for security or set-off made by creditors of Saad. The liquidators sought to protect these assets. The Federal Court made orders for recognition of the proceedings of the Grand Court of the Cayman Islands as a Foreign Main Proceeding and orders under Article 21 of the Model Law:

(a) for the protection of Saad's assets in Australia, including a stay on proceedings and execution against Saad or its assets and suspension of rights to transfer its assets;
(b) entrusting the administration, realisation and distribution of Saad's assets in Australia to the liquidators in their capacity as foreign representatives; and
(c) granting the liquidators all powers normally available to liquidators appointed under the Corporations Act.

198 In *Raithatha v Ariel Industries Plc*,[257] the UK liquidator of Ariel Industries Plc and Ariel Fasteners Ltd (each incorporated in the UK and collectively referred to as "Ariel" herein), was appointed under

255 [2009] FCA 1481; 77 ACSR 510.
256 [2010] FCA 1221.
257 [2012] FCA 1526; 212 FCR 139.

a creditor's voluntary liquidation by an administrative act of the Registrar of Companies of the UK. The Federal Court made orders recognising the UK proceeding as a Foreign Main Proceeding and, pursuant to Article 21 of the Model Law, made orders, *inter alia*, entrusting the administration and realisation of Ariel's assets in Australia to the UK liquidator, granting the liquidator all powers normally available to liquidators appointed under the Corporations Act and effecting a stay on the commencement or continuation of proceedings against Ariel or its assets.

199 Similarly, in *Wood v Astra Resources Ltd*,[258] the liquidators of UK incorporated company Astra Resources, brought an application under the Model Law for recognition in Australia of proceedings in the High Court of Justice of England and Wales in which an order was made for the winding up of Astra. The Federal Court made orders for recognition of the UK proceeding as a Foreign Main Proceeding and the associated orders sought by the liquidators under Article 21. In considering whether to grant the associated orders under Article 21, the court considered the interests of the creditors of Astra and formed the view that it would be in the interests of Astra and its creditors for there to be a single winding up rather than separate winding-up proceedings in the UK and Australia. To this end, the court noted that all creditors, including those outside the UK, would be able to prove in the winding-up proceeding in England and participate *pari passu* with creditors of the same class.

iii *Section 581 of the Corporations Act*

200 Section 581 of the Corporations Act contains "aid and auxiliary" provisions, which deal with co-operation between courts in external administration matters. Under section 581(2), which predates the adoption of the Model Law, an Australian court must "act in aid of, and be auxiliary to", the courts of "prescribed countries"[259] that have jurisdiction in all external administration matters.

258 [2016] FCA 1192.

259 Corporations Regulations 2001 (Cth) reg 5.6.74.

201 Assistance under section 581 will usually occur in the context of a request, most often in the form of a letter of request, from the appropriate courts of other countries. However, section 581 does not apply only as between courts, as illustrated in *Re Chow Cho Poon (Private) Ltd*[260] where the Supreme Court of New South Wales exercised its power under section 581 to act in aid of a Singapore liquidation on the application of a Singapore liquidator despite not receiving any request from the courts in Singapore to so act. In this case, the Singapore liquidator and the company, Chow Cho Poon (Private) Ltd ("CCP"), sought declarations under section 581(2)(a) of the Corporations Act recognising the liquidator's appointment as liquidator and recognising his authority to operate identified bank accounts of CCP in Australia. The Singapore liquidator sought these declarations because the relevant Australian bank would not recognise the status and authority of the liquidator without an Australian court order.

202 In granting the relief sought by the liquidator and CCP, the Supreme Court of New South Wales held that its decision would give added efficacy to the orders of the Singapore court by superimposing its authority on those orders and in doing so, it would be assisting the Singapore court and acting in support of it. Notwithstanding this decision, in most cases a request from a foreign court is considered essential in setting the parameters of the assistance the court will afford.

a Effect of recognition under section 581

203 Where an Australian court is required or elects to assist under section 581, it may exercise the powers it would have had if the matter had arisen in its own jurisdiction. A Foreign Representative might approach the court under section 581 seeking relief necessary for the debtor company to maintain protection against creditors and to assist with carrying out some aspect of a rehabilitation plan.

204 Despite the broad power under section 581, the court retains a discretion regarding the nature and extent of the aid to be given, limiting the commercial certainty involved in use of this provision.

260 [2011] NSWSC 300.

As such, an application for recognition and relief under the Model Law, which, subject to the satisfaction of certain criteria, requires the court to grant specific and (in the case of Foreign Main Proceedings) automatic forms of relief, is often a more advisable course for a Foreign Representative.

iv *Section 601CL – Ancillary liquidation of a foreign registered company*

205 For completeness, section 601CL(14) of the Corporations Act provides that, where a registered foreign company is wound up, dissolved or deregistered in its place of origin, the local agent of that company must lodge a notice with ASIC.

206 That section also provides that, on an application by a foreign liquidator, an Australian court must appoint an Australian liquidator of the foreign company. Under section 601CL(15), the Australian liquidator is required to recover and realise the property of the foreign company in Australia, and to pay the net amount so recovered and realised to the foreign liquidator.

v *Co-operation between courts*

207 The Supreme Court of New South Wales[261] and the Federal Court of Australia[262] have issued practice notes in essentially identical form, for the purposes of Articles 25 and 27 of the Model Law ("Practice Note"). The Practice Note states that co-operation for the purpose of Article 25 of the Model Law "will generally occur within a framework or protocol that has previously been approved by the Court, and is known to the parties, in the particular proceeding" and notes that in drafting a framework or protocol, the parties should have regard to the *Guidelines*

261 Supreme Court of New South Wales Equity Division, "Practice Note No SC EQ 6 – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives" (15 September 2017).

262 Chief Justice J L B Allsop, "Cross-Border Insolvency Practice Note: Cooperation with Foreign Courts or Foreign Representatives" (25 October 2016).

Applicable to Court-to-Court Communication in Cross-Border Cases published by the American Law Institute and the International Insolvency Institute and the *UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation*.

208 The Supreme Court of New South Wales' version of the Practice Note also adopts the Judicial Insolvency Network Guidelines ("JIN Guidelines") on an interim basis, subject to consideration by the court of any further amendments to the Corporations Rules or the Practice Note. Other Australian Supreme Courts have issued practice notes or directions, if not in identical form, then to the same effect as the Practice Note including, in the case of the Supreme Court of the Northern Territory, adopting the JIN Guidelines.[263]

vi *Adoption of protocols*

209 Whilst courts in the US, for example, utilise court-approved protocols to adjudicate cross-border insolvencies, there is no decided case by an Australian court involving the adoption of a protocol.[264]

210 The closest Australia has come was in *Parbery; Re Lehman Brothers Australia Limited*,[265] where the Federal Court was asked to exercise its power under the CBI Act to communicate directly with the docket judge, Judge Peck, for the Lehman proceedings in the US. Jacobson J in the Federal Court agreed to communicate with Judge Peck of the

263 Supreme Court of Victoria, "Practice Note, SC CC 6: Cross-Border Insolvency Cooperation with Foreign Courts or Representatives and Coordination Agreements" (January 2017); Supreme Court of Western Australia, Consolidated Practice Directions 2009; Supreme Court of Tasmania, Practice Direction No 2 of 2009, "Cross-Border Insolvency – Cooperation with Foreign Courts Foreign Representatives" (27 February 2009); Supreme Court of the Northern Territory, "Practice Direction No 4 of 2017: Cross-Border Insolvency". See generally Sheryl Jackson & Rosalind Mason, "Developments in Court to Court communications in International Insolvency Cases" [2014] UNSWLawJl 19; (2014) 37(2) UNSW Law Journal 507.

264 A protocol is usually an accord between practitioners and sanctioned by the court that deals with the conduct of joint elements of an insolvency case, such as the one used in the bankruptcy of Lehman Brothers.

265 [2011] FCA 1449.

US Bankruptcy Court informing him of the Australian application and asking whether Judge Peck would be prepared to establish a protocol for future communications provided that the necessary parties are consulted about the terms of any communication.

211 Subsequently, in the recent decision of *In the matter of Halifax Investment Services Pty Ltd (No 5)*,[266] Gleeson J indicated that she was in principle prepared to issue a letter of request pursuant to section 581 of the Corporations Act to the High Court of New Zealand for a joint sitting of that court and the Federal Court in relation to the treatment of comingled funds on the application of the liquidators, but that it was premature to do so pending greater clarity on, *inter alia*, creditor participation in the hearing.

266 [2019] FCA 1341.

APPENDIX OF LEGISLATION REFERRED TO

1. Bankruptcy Act 1966 (Cth)
2. Bankruptcy Regulations 1996 (Cth)
3. Corporations Act 2001 (Cth)
4. Corporations Regulations 2001 (Cth)
5. Cross-Border Insolvency Act 2008 (Cth)
6. Fair Work Act 2009 (Cth)
7. Federal Court (Corporations) Rules 2000 (Cth)
8. Insolvency Law Reform Act 2016 (Cth)
9. Insolvency Practice Rules (Corporations) 2016 (Cth)
10. Insolvency Practice Schedule (Corporations)
11. Personal Properties Securities Act 2009 (Cth)
12. Superannuation Guarantee (Administration) Act 1992
13. Supreme Court (Corporations) Rules 1999 (NSW)