Employee entitlements are afforded a level of priority in liquidations, receiverships and administrations. Under section 556 of the Act, employee entitlement claims are afforded a level of priority over other unsecured claims (noting that expenses of the liquidation still rank higher). A cap applies to the level of employee entitlements that are afforded priority for former officers of the company. In a receivership, employee entitlements are afforded priority over secured claims that are only secured by a security interest of circulating assets (the old floating charge).

A claim for unpaid employee entitlements is lodged in the same manner as other unsecured claims (ie, a proof of debt in the ordinary course). A statutory regime also exists (FEG) to supplement amounts available for employee claims.

Where there is unpaid superannuation in an insolvency, a super guarantee charge (SGC) is required to be paid before payments are made to ordinary unsecured creditors. This is an incurred penalty charge administered to employees owing to a failure to pay an employee's minimum superannuation guarantee on time and to the correct fund. SGC payments are ranked equally with employees' entitlement to wages and super contributions in circumstances where there are assets available for distribution to priority creditors. Priority SGC claims for excluded employees, such as directors and their spouses, are capped at A$2,000 and any amounts exceeding A$2,000 will rank pari passu with other unsecured claims.

Further, DOCAs are required to include a clause to the effect that eligible employee creditors will enjoy a priority under the administration, which is at least equal to what they would have received had there been a winding up.

Environmental problems and liabilities

Ultimate responsibility for any environmental issues will continue to rest with the relevant distressed debtor company. Upon appointment, an insolvency administrator will not automatically assume responsibility for these liabilities but will need to be aware of any such concerns and damage should they seek to continue to trade the company. Should further damage accrue during the course of the insolvency administrator trading the business, they may be held liable in the same way that directors have been held liable pre-appointment. Further, in scenarios where the insolvency administrator seeks to sell or realise the relevant asset, engagement with the environmental regulator will be required where there is pre-existing environmental damage and often remediation will be a contractual condition to the sale.

Creditors will not be held liable for controlling or remediating any environmental damage. The debtor's officers and directors could potentially be held liable for such liabilities in circumstances where the company enters formal liquidation and it can be shown the company was cash-flow insolvent at the time

Liabilities that survive insolvency or reorganisation proceedings

The liabilities of a corporate debtor do not subsist after a liquidation has concluded. Under either a voluntary or involuntary arrangement, the creditors will receive compensation from the company's assets in proportion to the debts owing to them in satisfaction of their claims. The company's debts will be discharged in the context of these restructuring proceedings and thus the creditors' claims will not subsist after winding up. Upon deregistration, a company will cease to exist as a corporate entity and any surplus assets will vest in the corporate regulator.

Unsecured claims subsist after a receivership has concluded and such creditors may bring an action against the company (noting they are unlikely to do so unless significant assets remain). The outcome of the second creditors' meeting during a voluntary administration will determine what creditors' claims subsist (ie, either a DOCA or winding up is likely to commence).

Under a scheme of arrangement, those creditors whose rights are not compromised or affected will continue to have their original claim against the company.

Distributions

In liquidation, distribution will occur when funds are available. Under a DOCA or a scheme of arrangement, the distribution arrangements are generally set out in the terms of the respective instruments. It is possible for interim distributions to be made as funds become available.

Security

Secured lending and credit (immovables)

The principal type of security that is taken on real property in Australia is a mortgage, for which a registration system exists (referred to as the Torrens Title system). Under this system, a mortgagor who has registered a mortgage with the relevant state or territory land title register grants a legal charge over the land as opposed to transferring legal title to the mortgagee. The mortgagor and mortgagee thereafter both possess a legal interest in the land. The mortgagor is free to deal with the land (subject to any restrictions in the terms of the mortgage itself) and retains the beneficial and legal interest in the land. The mortgagee holds a legal charge that will confer actionable rights in the event of default by the mortgagor.

written agreement) to enter into one or the mortgagor deposits the title deeds with the mortgagee.

Secured lending and credit (movables)

In 2012, the Personal Property Securities Act 2009 (PPSA) came into force in Australia, modelled largely on equivalent legislation in New Zealand and Canada. This legislation consolidated all of the existing registers on which security interests were previously registered and amended many of the concepts and terms associated with taking security over assets.

The PPSA introduced a uniform concept of a 'security interest' to cover all existing forms of security interests, including mortgages, charges, pledges and liens. It applies primarily to security interests under which an interest in personal property is granted pursuant to a consensual transaction that, in substance, secures payment or performance of an obligation. It also applies to certain deemed security interests such as certain types of lease arrangement for certain terms, retention of title arrangements and transfers of debts, regardless of whether the relevant arrangement secures payment or performance of an obligation. 'Personal property' is broadly defined and essentially includes all property other than land, fixtures and buildings attached to land, water rights and certain statutory licences.

The legislation has introduced a new lexicon relating to security in Australia. For instance, the traditional concept of a fixed and floating charge has now been replaced by 'general security agreement' and the PPSA now determines whether an asset is, in effect, subject to a floating charge on the basis that only circulating assets, as defined by the PPSA, will be treated as being subject to a floating charge for the purposes of other legislation including the provisions of the Corporations Act 2001 (Cth) that provide priority of certain claims over floating charge assets. Generally, attachment and perfection of a security interest occurs when the grantor and the secured party execute a security agreement, although the parties can defer attachment, and the security interest is registered on the PPSA register. However, security interests over certain assets can be perfected other than by way of registration; for example, by the security holder controlling the relevant asset in the manner prescribed by the PPSA.

The concept of security interest is broad enough to capture pre-existing forms of security and the documentation creating security has not changed significantly (ie, charges, debentures, mortgages and pledges may still be used with certain amendments).

One of the most significant changes implemented by the PPSA is to require the registration of retention of title arrangements to protect a supplier's title to the relevant supplied goods.

failure to perfect the retention of title arrangement (by registration) will vest title in the relevant goods in the recipient of the goods, despite the agreement between supplier and recipient that the supplier retains title to those goods until they are paid for.

The PPSA does not cover security interests in land or fixtures and buildings attached to land. A mortgage over real property must be registered under the Torrens Title system, which operates under Australian law by registration on the relevant state or territory land title register. There are also certain assets such as statutory licences (eg, mining licences), which, by virtue of statute, are expressed to be outside the operation of the PPSA, and any security interest over any such asset is governed by common law.

Clawback and related-party transactions

Transactions that may be annulled

The following types of transactions may be held to be void and set aside after a company has entered into liquidation:

- insolvent transactions (which includes both unfair preferences and uncommercial transactions); unfair loans;
- unreasonable director-related transactions; and
- transactions entered into for the purpose of defeating, delaying or interfering with creditors' rights on a company's winding up.

Uncommercial transactions and unfair preferences are voidable if the company was insolvent at the time of the transaction or at a time when an act was done to give effect to the transaction. To be set aside, the relevant transaction must have been entered into or given effect to within two years of the 'relation back day' (being the commencement of the winding up or in certain circumstances the date when an administrator was appointed). The courts have held a transaction 'uncommercial' if a reasonable person in the company's circumstances would not have entered into it. An unfair preference is one where a creditor receives more for an unsecured debt than would have been received if the creditor had to prove for it in the winding up. The other party to the transaction or preference may prevent it from being held void if it can be shown that they became a party in good faith, they lacked reasonable grounds for suspecting that the company was insolvent and they provided valuable consideration or changed their position in reliance on

Loans to a company are 'unfair' and thus voidable if the interest or charges in relation to the loan were, or are, not commercially reasonable. Any 'unreasonable' payments made to a director or a close associate of a director are also voidable, regardless of whether the payment occurred when the company was insolvent.

A liquidator can seek a court order under section 588FF of the Corporations Act 2001 (Cth) (the Act) with respect to suspected voidable transactions. Such orders must be sought within three years of the relevant 'relation back day' or within 12 months after the first appointment of a liquidator (whichever is later). Potential orders include the repayment of money paid or retransfer to the company of property it transferred. Orders may also be made varying a contract that is part of the transaction.

A liquidator can also apply to set aside 'creditor-defeating' transactions. Section 588FE(6B) of the Act enables liquidators to apply to set aside dispositions of property where the relevant transaction (or act done to effect the transaction) was entered into while the debtor company was insolvent, caused the debtor company to become insolvent or, directly or indirectly, resulted in the debtor company entering into external administration. The term 'Creditor-defeating dispositions' is defined in section 588FDB of the Act as a disposition where the consideration payable for the disposition was less than either the market value or the best price reasonably obtainable in the circumstances, and where the disposition has the effect of preventing, hindering or significantly delaying the process for the property becoming available for the benefit of creditors in the winding up.

In 2019, various amendments to the Act were introduced to enhance recovery measures for employee entitlements, namely:

- an extension of the previous criminal offence provision to capture a person recklessly entering into transactions to avoid the recovery of employee entitlements;
- a new civil offence for such action with an objective reasonable person test; and
- an ability for a liquidator, among others in certain circumstances, to seek compensation for loss or damage suffered because of a contravention of the civil penalty provision.

Equitable subordination

No. However, related party claims are likely to be subject to greater scrutiny.

Generally, lenders will not be held liable for the debts owed by an insolvent debtor. However, in certain circumstances, lenders working closely with a borrower (eg, lenders guiding a borrower in an effort to protect their debt exposure) may be considered 'de facto' or 'shadow' directors for the purposes of the Act and, therefore, exposed to liabilities associated with an insolvent debtor. A person may be held to be a de facto or shadow director of a company where, despite not holding an officer role in the company, they are a person in accordance with whose instructions and wishes others are accustomed to act (as detailed in the expanded definition of 'director' in section 9 of the Act). Such circumstances, for example, could expose a lender or their directors to liability for insolvent trading and other breach of directors' duties claims.

The New South Wales Court of Appeal considered this issue in the decision of Buzzle Operations Pty Ltd (in liquidation) v Apple Computer Australia Pty Ltd [2011] NSWCA 109. In that case, while the Court did not fin that the relevant persons were acting as shadow directors (and therefore were not liable for insolvent trading claims), it did consider that for a person to be considered a shadow director, something more than mere control is needed: the decision-making must be deferred to the relevant persons such that the existing directors follow the instructions of the purported shadow director because those instructions are themselves treated as a sufficient reason to act. That is, a secured creditor will not be taken to be acting as a shadow director merely because they influence decisions by virtue of any leverage concerning their secured interests. Rather, others must be accustomed to acting in accordance with their instructions in a general sense (eg, even if those instructions are contrary to the interests of the company).

Groups of companies

Groups of companies

Cross-collateralisation and group guarantees are often sought by lenders into a corporate group. These guarantees provide comfort that a holding company will stand behind special purpose vehicles or operating companies. There is also a statutory form of cross-guarantee lodged with the Australian Securities and Investments Commission allowing corporate groups to lodge consolidated financial statements. This statutory cross-guarantee provides for a group to be liable for each other group member's debts and is designed to afford a level of comfort to creditors providing services or lending to operating subsidiaries. It also affords relief to corporate groups from the onerous reporting obligations imposed by Chapter 2M.3 of Corporations Act 2001 (Cth) (the Act). If certain requirements are met, the holding entity and its wholly owned entities will be considered a single legal entity for financial reporting purposes and will be able to prepare consolidated financial report. Corporations (Wholly-owned Companies) Instrument 2016/785 currently provides relief to wholly owned subsidiaries, provided:

- the group executes the standard deed of cross guarantee form;

deed;

a lawyer has certified that the relevant deed's wording is in accordance with the ASIC pro forma; and the holding company prepares and lodges audited financial statements for the group as a whole.

Further, under section 588V of the Act, a holding company of a company may, in certain circumstances, be held liable for the insolvent trading of a subsidiary

Under the Act, a court can make a 'pooling order' such that in the liquidation of a group of companies each of the separate group companies are treated as if they were a single company. This means that the creditors of the group will have their claims 'pooled' so that, in effect, they are treated as creditors of one entity with a combined pool of assets for distribution.

Notwithstanding that the Act makes no provision for the pooling of assets and liabilities of a group of companies in administration, Australian courts have sanctioned the use of pooling arrangements for groups in administration proposing to execute a pooled deed of company arrangement (DOCA). Ultimately this will be a decision of the creditors voting; however, a pooled DOCA will be persuasive if the return creditors of the group as a whole will provide a greater return than if the individual entities ratified separate DOCAs or were placed into liquidation.

Combining parent and subsidiary proceedings

In insolvency proceedings involving corporate groups, a consolidated group is not considered as a single legal entity. Where companies operate as a consolidated group, the starting legal position is that the 'separate personality' principle prevents creditors of an insolvent company from gaining access to the funds of other companies for payment of their debts.

The Act, however, provides for a holding company to be liable for the debts of their insolvent subsidiaries in certain circumstances. These provisions enable the subsidiary's liquidator to recover amounts equal to the loss or damage suffered by creditors from the parent company if the parent failed to prevent the subsidiary from incurring debts while there were reasonable grounds to suspect that the subsidiary was insolvent.

The corporate veil may also be lifted in circumstances where an insolvent subsidiary is deemed to be acting as a mere agent, conduit or partner of its parent company. Australian courts have, however, displayed greater reluctance than their UK counterparts to lift the corporate veil in these circumstances.

must be made to the court requesting a meeting of the creditors and members. Where a scheme of arrangement is proposed involving a large corporate group, the application may request for the meeting to occur on a consolidated basis. An application for an order to transfer the whole of the assets and liabilities of the subsidiaries to the parent company may also be made when seeking approval of a proposed scheme.

This scheme requires significant court involvement and thus execution is generally slower and more expensive than voluntary administration.

Pooling of group funds may occur in limited circumstances, as prescribed by Division 8, Part 5.6 of the Act, being sections 571 to 579L. Generally, those circumstances are where there is a substantial joint business operation between members of the same corporate group and external parties, such that members of the group are jointly liable to creditors. The liquidator of the corporate group being wound up makes what is called a pooling determination, after which separate meetings of the unsecured creditors of each company must be called to approve or reject the determination. The court may vary or terminate any approved pooling determination.

A pooling order must satisfy all the requirements of section 579E of the Act. In forming a view, the court will often consider the operational realities of an insolvent group of companies; whether they are centrally managed, which entities are income-generating and what role is played by the parent entity. The court does not have power to make a pooling order if it will materially disadvantage an unsecured creditor, or if the possibility for disadvantage is not outweighed by the potential advantages of pooling assets.

In relation to a company in liquidation, the court may make orders for the transfer of assets from a winding up in Australia to an external administration outside Australia, either pursuant to section 581 of the Act or pursuant to the UNCITRAL Model Law on Cross-Border Insolvency, incorporated into Australian law by the Cross-Border Insolvency Act 2008 (Cth).

International cases

Recognition of foreign judgements

The Foreign Judgments Act 1991 (Cth) (FJA) creates a general system of registration of judgments obtained in foreign countries. The FJA only extends to judgments pronounced by courts in countries where, in the opinion of the governor general, substantial reciprocity of treatment will be accorded by that country in respect of the enforcement in that country of judgments of Australian courts. Judgments of other foreign countries may also be recognised under the common law rules for the recognition of foreign judgments.

has been taken, within six years of the last judgment in the appeal proceedings.

UNCITRAL Model Law

Australia formally adopted the UNCITRAL Model Law on Cross-Border Insolvency by implementing legislation called the Cross-Border Insolvency Act 2008 (Cth) (the Cross-Border Act).

This legislation adopts the UNCITRAL Model Law with as few changes as necessary to adapt it to the Australian context. Some of the most important features of the legislation include:

- the participation by foreign creditors in local insolvency proceedings;
- facilitated cooperation between courts and insolvency practitioners from different countries;
- allowing a person administering a foreign insolvency proceeding to have access to local courts and in which circumstances this is possible;
- the setting out of conditions for recognition of an insolvency proceeding and for granting relief to representatives of such a proceeding; and
- the ability to effectively coordinate insolvency proceedings occurring concurrently in different states.

Foreign creditors

Under the Cross-Border Act, foreign creditors, save for tax and penal debts, have the same rights regarding the commencement of, and participation in, insolvency proceedings as an Australian creditor. All foreign claims must be converted into Australian currency for the purposes of the proceedings.

Cross-border transfers of assets under administration

In relation to a company in liquidation, the court may make orders for the transfer of assets from a winding up in Australia to an external administration outside Australia, either pursuant to section 581 of the Corporations Act 2001 (Cth) or the Cross-Border Act.

COMI

debtor's main interest is its registered office, or in the case of a natural person, his or her habitual residence. The UNCITRAL Model Law is silent on the standard required for COMI determination.

Given this, the Australian courts have looked to and adopted similar reasoning to other jurisdictions when considering COMI (eg, the bankruptcy courts in the United States) and have equated the concept of COMI with the principal place of business. In considering where the COMI of a debtor or group of companies exists, the courts will look at a number of factors, including:

- the location of the debtor's headquarters;
- the location of those who actually manage the debtor; the location of the debtor's primary assets;
- the location of the majority of the debtor's creditors or a majority of creditors who would be affected by the case; and
- the jurisdiction whose law applies to most disputes.

Cross-border cooperation

Section 581 of the Act provides that an Australian court may request a foreign court with jurisdiction in external administration matters to render assistance in the recovery of overseas property of the company. In deciding whether to authorise a letter of request, one important consideration will be how likely it is that the foreign court will act upon the request.

The Cross-Border Act provides an alternative method whereby an Australian insolvency practitioner may seek recognition under the UNCITRAL Model Law in a foreign jurisdiction and thereby give the foreign court independent jurisdiction to provide assistance. Under the UNCITRAL Model Law, the insolvency practitioner may then have authority to recover assets in the foreign jurisdiction.

In relation to insolvency proceedings conducted in a foreign jurisdiction, section 581 of the Act also provides that an Australian court must assist bankruptcy courts of prescribed countries and has a discretion to assist courts of other countries. The prescribed countries are Canada, Jersey, Malaysia, New Zealand, Papua New Guinea, Singapore, Switzerland, the United Kingdom and the United States. Once again, the UNCITRAL Model Law provides an alternative procedure, whereby a representative in a foreign jurisdiction may approach an Australian court requesting assistance in the recovery of property located in Australia belonging to the foreign company. In Re Cow Cho Poon (Private) Limited (2011) 249 FLR 315, a Singaporean liquidator made an application to an Australian court pursuant to section 581 of the Act seeking

of utility and would aid the effectuation of the winding-up orders made by the Singapore court. It is likely that a similar result would have been reached had the UNCITRAL Model Law been invoked.

While in most cases Australian courts have formally recognised foreign proceedings under section 581 of the Act when requested to do so, there have been exceptions. For example, in Yu v STX Pan Ocean Co Ltd (South Korea), in the matter of STX Pan Ocean Co Ltd (receivers appointed in South Korea) [2013] FCA 680, the court was reluctant to grant additional relief as the relief sought would adversely affect any rights that other Australian creditors may otherwise have had, whether under the Act or otherwise.

There is an example where an Australian court has refused to recognise foreign proceedings or grant relief sought under the Cross-Border Act in relation to a corporate insolvency. In Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc (2016) 52 VR 1, the court refused to recognise US Chapter 11 proceedings in circumstances where the holding company's COMI was Australian (relevantly its assets and operations that were undertaken by its subsidiaries are all in Australia), and the company's US presence was purely administrative.

Cross-border insolvency protocols and joint court hearings

In January 2020, the Federal Court of Australia published the Cross Border Insolvency Practice Note: Cooperation with Foreign Courts of Foreign Representatives, which states that the court's cooperation obligation will be guided by the Guidelines for Communication and Co-operation between Courts in Cross-Border Insolvency Matters and the Modalities of Court-to-Court Communication (both published by the Judicial Insolvency Network), and the Practice Guide on Cross-Border Insolvency Co-operation 2009 (published by UNCITRAL).

Many of the cases involving cross-border elements heard in Australian courts involve the protection of assets and the issuance of injunctions or stay orders. One such example was the case of Lawrence v Northern Crest investments Limited (in liq) [2011] FCA 672, where an interim injunction was granted against the Australian directors of an insolvent New Zealand company restraining them from dealing with the company's assets, pending an application by the liquidator for orders that the winding-up proceedings in New Zealand be classified as a 'foreign main proceeding'.

The case of Re Kelly, Halifax Investment Services Pty Ltd (in Liq) (No. 5) [2019] FCA 1341 is a recent example of the Federal Court of Australia cooperating with the High Court of New Zealand to conduct a joint hearing of liquidators' application for directions.

Court of Australia was to be at least partially informed by the Guidelines for Communication and Co-operation between Courts in Cross-Border Insolvency Matters. Gleeson J granted the relief sought pursuant to section 581(4) of the Act, which provides that the Court may request a court of another country that has jurisdiction in external administration matters to act in aid of and be auxiliary to it in an external administration matter. The substantive hearing was subsequently heard jointly by the Federal Court of Australia and the High Court of New Zealand (being the first concurrent hearing between these two courts).

Winding-up of foreign companies

The rise of foreign investment in Australia has also seen a steady increase in the number of insolvencies of foreign companies in Australia. A foreign company that falls within the classification of a 'Part 5.7 body', that is, a foreign company that is registered under the Act or carrying on business in Australia, can be wound up under Australian insolvency processes. Once a foreign company carries on business in Australia, it is susceptible to a winding-up order, regardless of whether it has subsequently ceased to carry on business in the jurisdiction (see Australian Securities and Investments Commission v Edward [2004] QSC 344). Pursuant to section 583 of the Act, a Part 5.7 body can be wound up where it is unable to pay its debts, has been dissolved or deregistered, has ceased carrying on business in Australia or on just and equitable grounds. Largely mirroring the procedure for winding up an insolvent Australian company under Part 5.4 of the Act, the creditor is required to serve on the Part 5.7 body a statutory demand requiring payment of debt of at least A$4,000 within 21 days. In response to the covid-19 pandemic, the Australian government made temporary changes to insolvency laws that included increasing the threshold amount for which creditors can issue a statutory demand (from what was then a minimum of A$2,000 to A$20,000) and the time for compliance of a statutory demand (from 21 days to six months). Following the expiry of these temporary changes on 31 December 2020, the Corporations Amendment (Statutory Minimum) Regulations 2021 amended regulation 5.4.01AAA of the C orporations Regulations 2001 (Cth) such that, from 1 July 2021, the statutory minimum amount for issuance of a creditor's statutory demand increased from $2,000 to $4,000 but the period within which a debtor must respond to a statutory demand remains at 21 days.

However, failure by a Part 5.7 body to pay the debt within the prescribed period does not result in an automatic presumption of insolvency (as is the case in a winding up under Parts 5.4 and 5.4B), but rather gives rise to a presumption that the company is unable to pay its debts (see Cato Brand Partners Pty Ltd v Air India Limited [2016] VSC 28). Where concurrent foreign and local liquidations are taking place regarding the same debtor and there is inconsistency between Part 5.7 of the Act and the UNCITRAL Model Law, section 22 of the Cross-Border Act dictates that the UNCITRAL Model Law prevails.

The Australian courts also have jurisdiction to order an ancillary liquidation where a foreign company registered in Australia is subject to a contemporaneous foreign liquidation. Section 601CL(14) of the Act

and Investments Commission, appoint an Australian liquidator of the foreign company. The powers of the Australian liquidator are limited, and unless the court otherwise orders, the net amount of all property of the foreign company recovered and realised by the Australian liquidator must be paid to the foreign liquidator.

Update and trends

Trends and reforms

On 28 September 2022, the federal government commenced an inquiry into the effectiveness of Australia's corporate insolvency laws in protecting and maximising value for the benefit of all interested parties. The investigating committee has noted that it recognises the need for Australia's corporate insolvency regime be 'fit for purpose' and to 'effectively serve the Australian economy and all participants in it'. Accordingly, it has announced a broad review of recent and emerging trends in the use of corporate insolvency in Australia, including temporary covid-19 insolvency measures, and other policy measures introduced in response to the pandemic; and recent changes in domestic and international economic conditions, increases in material and input costs for businesses and inflationary pressures more broadly, and supply shortages in certain industries. Potential areas flagged for reform by the committee include the unfair preference regime, the treatment of trusts with corporate trustees as they relate to corporate insolvency, insolvent trading, safe harbour protection, and international approaches and developments. The committee is accepting submissions from interested persons and stakeholders up until 30 November 2022, with a view to submitting a report to both Houses of Parliament by 30 May 2023.

Recently, the courts have affirmed several long-standing principles and clarifying the position at law for practitioners.

For example, the High Court's decision in Walton v ACN 004 410 833 Limited (formerly Arrium Limited) (in liquidation) [2022] HCA 3 held that 'eligible applicants' (in this case, shareholders of failed companies) were entitled to summon former officers of those companies for public examination pursuant to section 596A of the Corporations Act 2001 (Cth) (the Act). The majority of the High Court held that public examinations under section 596A conducted for the purpose of obtaining evidence and information to support the commencement of proceedings against a company, its officers or advisers (and which was not for the ultimate benefit of the company or its creditors) is not an abuse of process. With that said, the Court retains its overarching jurisdiction to refuse an application for public examination if it considers that it would amount to an abuse of process.

Another separate example of the Court clarifying and affirming the position at law is in the case of Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd v Metal Manufacturers Pty Limited [2021]

preference. The Court considered how the Act's unfair preference provisions interact with insolvency set-off under section 553C. Crucially, this included analysis of the requirement of 'mutuality'. That is, the claims that are sought to be set-off against one another must be between the same parties, and those parties must hold those claims for their own benefit and interest. Also relevant was the requirement that the liability being set off must already exist (even if in the form of a contingent liability) at the commencement of the liquidation.

Section 443B of the Act sets out the circumstances in which an administrator will be liable for payments for property used, occupied or in the possession of the relevant company during the administration period. Section 443B(2) provides that an administrator will be liable for rent and amounts payable under the relevant agreement that are attributable to the period commencing five business days after the administration begins (the grace period) and during which the company continues to use, occupy or possess the relevant property during the administration period.

The administrator may give notice before the end of the grace period stating they do not wish to continue to exercise rights in relation to the period. The effect of this notice is that, from the date of the notice until it is revoked, the administrator will not be liable for amounts owing under the relevant leasing arrangement for the period commencing after the grace period.

Section 443B(8) of the Act (together with the operations of the more general powers under section 447A of the Act) allows an administrator to apply to court to 'excuse' the administrator for any liability even where the notice was not given to the lessor before the expiry of the grace period. Also, an administrator may apply to court seeking to extend the grace period, in circumstances where:

> further time is required to allow the administrators an opportunity to explore all options available to recapitalise or sell the company as a going concern, or to otherwise explore the possibility of entering into a deed of company arrangement (which includes deciding whether the company or administrators should continue to occupy the leased premises); and
>
> the extension is in the best interests of the creditors as a whole.

The operation of section 443B only impacts the liability of the administrator. It does not affect the liability of the relevant company in administration.

In response to issues arising out of the covid-19 pandemic, there were three significant decisions regarding section 443B, each demonstrating the court's willingness to extend the grace period under section 443B in

First, in Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No. 2) [2020] FCA 472, at the expiration of the grace period, the administrators elected to remain in possession of the relevant property and thereafter paid rent in accordance with the lease agreements that accrued after the grace period (with such payments forming part of the costs of the administration, and payments for which the administrators were personally liable). Subsequently - and as a result of the impact of the covid-19 pandemic - the administrators sought, and were granted, orders that they should not be personally liable for amounts due under the leases, notwithstanding that the company would continue to occupy and remain in possession of the property. Further, the administrators sought, and were granted, a declaration from the court that they would be justified in not causing the company to pay the amounts due even though the company remained liable for those amounts.

Second, in the administration of the Virgin Airlines group of companies (Virgin Group), the administrators applied for, and the court granted, orders modifying the time periods under sections 443B(2) and 443B(3) before the end of the grace period. The effect of the orders resulted in the Virgin Group administrators carrying on the Virgin Group's business with the benefit of an extension of the grace period in respect of certain liabilities for the administration period.

Third, in Ford (Administrator, in the matter of The PAS Group Limited (Administrators Appointed) v Scentre Management Limited [2020] FCA 1023) (PAS Decision), the Federal Court of Australia considered the administrators' application for judicial directions as to whether rental amounts accruing during an administration period should be treated as a priority expense under section 556(1)(a) of the Act. Relevantly, the administrators previously sought, and were granted, an extension of the grace period under section 443B of the Act from the commencement of the administration (29 May 2020) until 22 June 2020. O'Callaghan J rejected the administrators' application, finding that by operation of the principle in Lundy Granite, the amounts payable under the lease arrangements during the extended grace period would be payable in a liquidation as a cost of the administration (that is, afforded priority under section 556(1)(a) of the Act). Having considered the parties' submissions and applying the principle in Lundy Granite, His Honour declined to make the order in circumstances where the administrators had actively traded from all but eight out of 161 leases, the administrators had 'elected to cause the company to continue in occupation of those leased premises for the purposes of the administration'.

On 3 May 2021, the federal government announced that it would consult with industry on improving schemes of arrangement to better support businesses, including by introducing a moratorium on creditor enforcement while

The consultation was aimed at assessing whether the current scheme of arrangement process is useful as a means of restructuring insolvent companies. In its current form, schemes of arrangement are typically used in complex restructurings of large corporate groups, involve a high level of court involvement and, unlike other insolvency processes (eg, voluntary administration), there is no automatic moratorium to prevent creditors from bringing claims against the company during the negotiation and formation of the scheme.

The federal government is considering the efficacy of introducing an automatic moratorium on creditor claims to provide 'breathing space' to financially distressed companies and what effect that could have on creditor rights. In particular, the consultation sought input from stakeholders as to:

whether an automatic moratorium should apply from the time a company proposes a scheme of arrangement; whether the moratorium applicable in a voluntary administration would be a suitable model on which to base the proposed moratorium for a scheme of arrangement, if any adjustments are required and if the court ought to be granted the power to modify or vary the moratorium;

when any moratorium should commence and terminate, and how long it should last;

whether any additional protections against liability for insolvent trading are required to support the proposed moratorium;

what safeguards are required to protect creditors that extend credit to the company during the automatic moratorium period; and

whether insolvency practitioners assisting with the scheme should be permitted to act as voluntary administrators of the company where the scheme fails.

The consultation also sought input on the efficacy of the current scheme of arrangement framework generally. As of 8 August 2022, there were 22 submissions from stakeholders, including advisers, industry bodies and insolvency practitioners.

In our view, the addition of a moratorium on creditor claims during the formulation of a scheme of arrangement is a welcome change and is likely to lead to higher uptake of the process by financially distressed (but still solvent) companies.

Inquiry into corporate insolvency in Australia announced

Restructuring and Insolvency in Australia - The Restructuring Review 2022

Key contacts

Peter Bowden

Partner

Melbourne

Get in touch

Contact us

Gilbert + Tobin acknowledges Australia's First Nations peoples as the Traditional Custodians of this land. We pay our respects to Elders, both past and present, and extend that respect to all First Nations peoples across these lands.

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From: andrew.garrett@dynamic-capital-bank.com
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Subject: AMG 9072a; HCMP-1855-2022 (“THE MAIN PROCEEDINGS”); S ECI 2025 02829; CIV 1453 of 2023; NSD-885-2025; COMPLETE COLLAPSE OF RULE OF LAW/ COMMONWEALTH CONSPIRACY AGAINST RIGHTS AS TERRORIST ACTS PART 1
Attachments: AMG 9058 ANNEXURE 2 amended AMG Timeline - p 1-9 v3_compressed.pdf; AMG 9072 OVCR Letter to Associate Justice Ierodiacono Minter Ellison, Piper Alderman, Coors Chambers Westgarth dated 16.09.2025 and ANNEXURES 1-7.pdf

Importance: High

Tracking:

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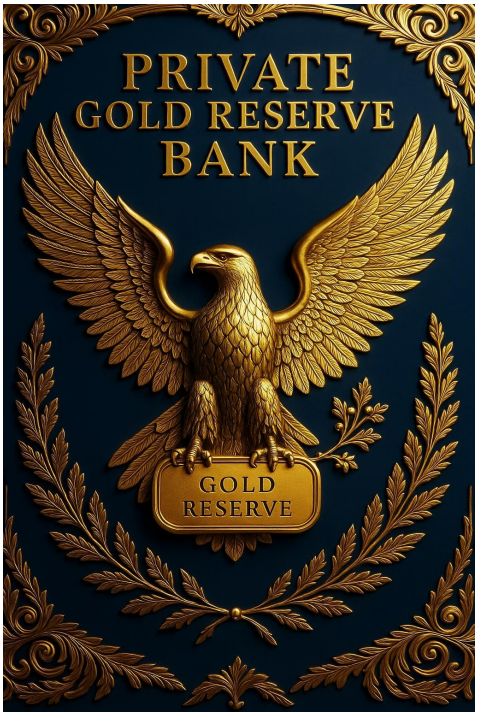
NOTICE OF VALID REGIME CHANGE.

AMG 9072; HCMP-1855-2022 (“THE MAIN PROCEEDINGS”); **S ECI 2025 02829**; **CIV 1453 of 2023; NSD-885-2025**; COMPLETE COLLAPSE OF RULE OF LAW/ WHOLE OF COMMONWEALTH CONSPIRACY AGAINST RIGHTS AS TERRORIST ACTS OF PUBLIC OFFICIALS OF COMMONWEALTH, STATE AND TERRITORY GOVERNNMENTS, THE LEGAL, BANKING, ACCOUNTING AN JUDICIAL PROFESSIONS

http://privategoldreservebank.com/ ; Lev 1, Devonshire House, 1 Mayfair Place, London UK W1J 8AJ



To: those named in the Exhibits produced and marked as:

- AMG 7264 NSD 741 of 2023 SEALED Filed Respondent's Reply to Concise Statement and Cross Claim 11.12.2023.pdf
- AMG 7965 NSD 741 of 2023 ADDENDUM TO CONCISE REPLY AND CROSS CLAIM TO CONCISE STATEMENT OF LUCINDA MCCANN AND evidence of lodgement.pdf and Indictment annexed thereto ANNEXURE 1

Form CP14
Federal Court (Criminal Proceedings) Rule 3.01
Federal Court of Australia Act 1976 section 23BA to section 23BH

Indictment

No. 741 of 2024

REMOVED TO THE JURISDICTION OF SAR HONG KONG[1]

Federal Court of Australia & The High Court of Hong Kong

District Registry: NSW & Hong Kong

Division: Mixed

Andrew Morton Garrett

Prosecutor

Mark Dreyfus[2]

94th Accused

---

[1] **AMG 6857:** NOTICE OF REMOVAL; HCMP-1855-2022 IN THE MATTER OF THE CROWN (LIQUIDATOR AND MANAGING CONTROLLER APPOINTED 13TH AUGUST 2023.
AMG 6957: RE AMG 6857 NOTICE OF REMOVAL NSD-741-2023 TO HCMP-1855-2022 DEBT OF AUSTRALIA TO BRAZIL (ACCOUNT OF ABA HOLDINGS) 13TH AUGUST 2023.

[2]

1. https://www.ag.gov.au/crime/anti-money-laundering-and-counter-terrorism-financing

   *Australia and the United Kingdom discussed **the scourge of grand corruption** and how best to use tools at our disposal to hold corrupt officials to account and to restrict the enabling environment in which corruption takes place. We discussed opportunities to support global efforts to fight corruption and assist those who are harmed by corruption and noted the role of civil society in our anti-corruption efforts. These stakeholders play a crucial role in combatting corruption.*

   Australia and the United Kingdom have a long history of co-operation to counter illicit financing and related threats. In order to deepen this co-operation, and recognising the benefit of this dialogue, we agreed to continue the dialogue with its next iteration to be hosted by Australia in 2024 as we work to stem the global flow of illicit funds together.

2. Modernising Australia's anti-money laundering and counter-terrorism financing regime - Attorney-General's Department - Citizen Space (ag.gov.au)

   On 20 April 2023 the Attorney-General announced public consultation on proposed reforms of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime.

   The Australian Government is committed to protecting the integrity of the Australian financial system and improving Australia's AML/CTF regime to ensure it is fit-for-purpose, responds to the evolving threat environment, and meets international standards set by the Financial Action Task Force (FATF), the global financial crime watchdog and standard-setter.

Filed on behalf of (name & role of party)	The Respondent/ Cross Claimant
Prepared by (name of person/lawyer)	Andrew Garrett
Law firm (if applicable)	
Tel 0450 831 708	Fax 02 9617 7125
Email	amg@betterworldfuturefund.org
Address for service (include state and postcode)	Unit 3/ 11 Harvey Street, Nailsworth, South Australia, 5083

TO; the Honourable Associate Justice Ierodiaconou,
Attn Ms. Sarah Kivinen,
Associate to the Honourable Associate Justice Ierodiaconou
Department of Justice of Victoria trading as Supreme Court of Victoria
210 William Street, Melbourne VIC 3000
Tel: 03 8600 2541
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CC: Mrs; Dorota Borkowski and
Mr Michael Mark Borkowski
Tenants In Common as Joint Trustees of
the Borkowski Family Irrevocable Living Trust,
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Email; dorisborkowski@bigpond.com
("**The Joint Plaintiffs**")

TO: Burchell J as Trustee for Department of Justice and Community Safety Victoria, trading as The County Court of Victoria, ABN 32 790 228 959
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Manager, Priority Cases, Executive Complaints/ Customer Solutions Complaints/ Customer & Corporate Services/ Customer Solutions
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Second Defendant

To: Minter Ellison Limited ABN 77 478 593 704; ABN 91 556 716 819; ABN 46 001 549 480; ABN 99 009 717 391 (Liquidator and Managing Controller Appointed) ABN 92 236 032 942
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To: Susheila Vijendran, Registrar of Titles, for and on behalf of the Department of Transport and Planning of Victoria (Liquidator and Managing Controller Appointed) ABN 69 981 208 782
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Fourth Defendant

To: **Jaclyn Symes,** Attorney General of The State of Victoria CEO of the Department of Justice of Victoria trading as the Sherriff's Office, ABN 32 790 228 959
Together with
Mark Dreyfus, Attorney General of Commonwealth of Australia CIK; 0000805157 (Liquidator and Managing Controller Appointed) ABN 86 150 409 985 and CEO of the Department of the Commonwealth Attorney General, ABN 92 661 124 436
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Fifth Defendant

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Sixth Defendant

To: The CEO of the Australian Financial Transactions Analysis Reporting Centre
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Seventh Defendant

TO: The CEO of Office of Foreign Assets Control of U.S. Department of The Treasury,
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Ninth Defendant.

TO: Anthony Leonard Dickman, Acting CEO of The Reserve Bank of Australia, ABN 50 008 559 486 (Liquidator and Managing Controller Appointed) ABN 78 837 313 084 ("**RBA**") 65 Martin Place Sydney, NSW, 2000
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Eleventh Defendant.

TO Joe Longo, Acting CEO of The Australian Securities and Investment Commission, ABN 86 768 265 615 (Liquidator and Managing Controller Appointed) ABN 14 930 849 717 ("**ASIC**")
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Eighteenth Defendant.

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Twentieth Defendant.

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Twenty Second Defendant.

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Twenty Third Defendant.

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Twenty Seventh Defendant.

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Thirtieth Defendant.

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Thirty Third Defendant.

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Thirty Fifth Defendant.

TO: Acting CEO of The Gehrig Piper Alderman Practice Trust trading as PIPER ALDERMAN LAWYERS ABN 25 549 962 112 (LIQUIDATOR AND MANAGING CONTROLLER APPOINTED)
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CC MS. YUNG WAI-YAN
ASSESSOR, PROFITS TAX SECTION
INLAND REVENUE DEPARTMENT
INLAND REVENUE CENTRE
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CC; THE JUDICIAL CLERK TO THE JUDICIAL OFFICER PRESIDING IN HCMP-1855-2022; IN THE MATTER OF THE CROWN (LIQUIDATOR AND MANAGING CONTROLLER APPOINTED)

CC: MR MILTON TANG, FOR JUDICIARY ADMINISTRATOR

CC; MS KARA JUNCKEN

SENIOR ADVISOR COMPLIANCE
PERSONAL PROPERTY SECURITIES AND REGULATORY PROGRAMS DIVISION
Regulatory Operations Group | Australian Financial Security Authority (LIQUIDATOR AND MANAGING CONTROLLER APPOINTED)
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CC: EMBASSY OF THE RUSSIAN FEDERATION IN AUSTRALIA
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Dear Associate Justice Ierodiaconou, Partners of Finlaysons Lawyers, Minter Ellison Lawyers, Coors Chambers Westgarth Lawyers, Dentons Australia Limited Lawyers, Piper Alderman Lawyers, and those as addressed,

Please note attached:

1. AMG 9072 OVCR Letter to Associate Justice Ierodiaconou, Minter Ellison, Piper Alderman, Coors Chambers Westgarth dated 16.09.2025 and ANNEXURES 1-7
2. amendment to Annexure 2 to my Letter dated 28th August 2025 and Annexures.

KIND REGARDS

ANDREW MORTON GARRETT

UNITARY EXECUTIVE, INTERNATIONAL CROWN ATTORNEY GENERAL, CHIEF JUSTICE OF INTERNATIONAL CROWN COURT OF JUSTICE CHIEF JUSTICE OF INTERNATIONAL CROWN CRIMINAL COURT FOR THABOLITION OF IMPUNITY, GLOBAL MANAGING DIRECTOR, GLOBAL MANAGING TRUSTEE; CHAIRMAN OF BOARD OF TRUSTEES, GLOBAL LICENSOR OF DISCRETIONARY PUBLIC POWERS, GLOBAL TRUSTEE IN BANKRUPTCY, GLOBAL LIQUIDATOR, GLOBAL MANAGING CONTROLLER, GLOBAL RECEIVER AND MANAGER.

"And when they seek to oppress you, and when they try to destroy you, Rise and rise again and again Like the Phoenix from the ashes.
Until the lambs have become lions and the rule of Darkness is no more"
— Maitreya The Friend of All Souls, The Holy Book of Destiny.

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Registered address: Level 1, Devonshire House, One Mayfair Place, London, W1J 8AJ

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E: andrew.garrett@dynamic-capital-bank.com ; andrew.garrett@betterworldfuturefund.org ; andrew.garrett@oenoviva-capital-rezources.com ; contact@privategoldreservebank.com

Monday, 27 October 2025

TO: Korn Ferry
Attn The Relevant Persons
Level 18, Aurora Place
88 Phillip Street, Sydney, NSW 2000
Australia
Email; apra-deputychair2025@kornferry.com
Email; asic-chair2025@kornferry.com

AMG 9156 HCMP-1855-2022; IN THE MATTER OF THE CROWN (LIQUIDATOR AND MANAGING CONTROLLER APPOINTED); NOTICE OF OCCUPATION OF OFFICE AS GLOBAL INTERNATIONAL CROWN UNITARY EXECUTIVE/ GLOBAL INTERNATIONAL CROWN LIQUIDATOR/ CHAIRMAN OF THE AUSTRALIAN SECURITIES EXCHANGE COMMISSION AND AUSTRALIAN PREUDENTIAL REGULATORY AUTHORITY

Dear Consultants,

Australian Government
Australian Business Register

Australian Business Register

05 October 2022

Australian business number (ABN)	14 930 849 717
Entity name	
The Trustee for Australian Securities Investment Commission ABN 86 768 265 615 (Liquidator and Managing Controller Appointed)	
ABN status	Active
ABN registration date	05 August 2019
Postal address	Unit 3 11 HARVEY ST NAILSWORTH SA 5083
Business address	L 6 111 MACQUARIE ST HOBART TAS 7000
Email address	admin@dynamic-capital-bank.com
Type of entity	Discretionary Services Management Trust
ANZSIC code	7510 - Central Government Administration

Associate name	Position held
MR ANDREW MORTON GARRETT	Trust Beneficiary Trustee

Australian Government
Australian Business Register

Australian Business Register

06 October 2022

Australian business number (ABN)	33 446 145 662
Entity name	
The Trustee for the Australian Prudential Regulatory Authority ABN 79 635 582 658 (Liquidator and Managing Controller Appointed)	
ABN status	Active
ABN registration date	10 July 2000
Postal address	Unit 3 11 HARVEY ST NAILSWORTH SA 5083
Business address	L 6 111 MACQUARIE ST HOBART TAS 7000
Email address	admin@dynamic-capital-bank.com
Type of entity	Discretionary Services Management Trust
ANZSIC code	7510 - Central Government Administration

Associate name	Position held
MR ANDREW MORTON GARRETT	Trust Beneficiary Trustee

I refer to the advertisements shown at Annexures 1 and 2 and write to place you on notice that the rights of the Directors and Officers of the Crown in right of Australia and in right of its global rights are the subject of my appointment as Liquidator and Managing Controller in which regard those rights are suspended as are the rights of the Shareholders of Corporate Australia created under *the Commonwealth of Australia Constitution Act*

1900 (Imperial).

By way of background since the date of the ASIC Act 1990 (AU) and the Corporations Act 2001 (AU) ASIC has conspired against my rights and the citizens of the world to perpetuate Tax Revenues that are Ill Gotten arising from Terrorism Financing and Money Laundering.

IMPUNITY OF MONEY LAUNDERING AND TERRORISM FINANCING TERRORISTS

Extremely Serious findings of fact were made on the 1st February 2019 in the Haynes Royal Commission into the Financial Services Sector evidencing there was no meaningful enforcement in respect to the exercise of discretionary public powers in that sector being "Fake Regulation", resulting collapse of Rule of Law and breaches of Separation of Powers in respect to misconduct and malfeasance of the Judicial Profession, the Legal Profession, Accounting Profession, Banking Profession, and the Regulators evidencing that Self-Regulation is Mis-Regulation in perpetuation of Tax Revenues that are "Ill Gotten" as "Fruit from the Poisonous Tree" by protection of the practice by public officials of the Common Law Torts of Criminal Defamation, Criminal Trespass, Champerty, Maintenance and Barratry as disclosed in the recitals to the grant of the Licenses to OenoViva Business Systems Intellectual Property between the 11th April 1957 and today's date.

Following the enacting of the *Vienna International Convention of the Law of Treaties* 1969 (UN), the Rome Statute in 1998 and *the United Nations Convention on Suppression of Terrorism Financing* in 1999, ASIC entered unlawful and invalid Memoranda of Understanding with the following Agencies of the Crown in order to impermissibly fetter the exercise of discretionary public powers conferred under enactments and thereby effectively control the transfer of stored value and weaponize the Monetary System via the following **Memoranda of Understanding** between ASIC and:

- The RBA dated 18th March 2002 (AMG 2235)
- Australian Competition & Consumer Commission (ACCC) dated 15th December 2004 (AMG 2233)
- Commonwealth Director of Public Prosecutions (CDPP) dated 1st March 2006 (AMG 2239)
- Australian Prudential Regulatory Authority (APRA) dated 18th May 2010. (AMG 2234)
- Australian Financial Security Authority (AFSA) dated 30th September 2014. (AMG 2236)
- Australian Stock Exchange Limited (ASX) dated 28th October 2011. (AMG 2237)
- The ATO dated 21st December 2012. (AMG 2238)
- The Federal Court of Australia (AMG 295, AMG 296 and AMG 297 including Transcripts of Senate Inquiry 19th January 2016 Admission of breach of Separation of Powers by the ATO)

Despite those findings and similar serious findings of malfeasance in public office made against ASIC and the Agencies above pursuant to Senate Enquiries in 2010 and 2014, ASIC remains substantially out of control and unregulated such that Self-Regulation is Mis-Regulation as evidenced by the Commonwealth Ombudsman own motion enquiry in 2015 which made no such findings and no effective means of regulation. Australian Law Reform Commission Report on Corporate Criminal Responsibility ALRC Report # 136 published April 2020 and the flurry of Domestic Legislative Branch activity, Executive Activity remained ineffectively addressed by the Judicial Branch of Government between 20017 and today's date in circumstances where the Evidence shows that the Legal Profession is hopelessly corrupt and the High Court of Australia along with all other Federal, State and Domestic Courts continue to avoid the fundamental issue of our Corrupt Legal System and that Lawyers believe they are licensed to Lie and Steal acting with impunity with no fear of being held to account.

This absence of effective regulation has resulted in enactments by me as the unitary executive to establish regulatory delegates and agencies to enforce the principles of federation expressed in *the Charter of the Commonwealth* 2013 (Regina) as a Royal Prerogative Writ of Mandamus addressed to the citizens and governments of member nations of the Commonwealth of Nations.

Please accept this communique as an application in writing for a copy of all documents and things related to your authority to act pursunat to the Crown Model Litigant Obligations for Continuous Full Disclosure.

Kind Regards

Signature: _____

Name / Title: ANDREW MORTON GARRETT: Global Chairman/ Managing Trustee of the Boards of Trustees of the Andrew Garrett Family Irrevocable Living Trust trading as OenoViva Capital Resources (Global) and the Better World Future Fund (Global) , Global International Crown Unitary Executive, Global International Crown Attorney General, Global Chief Justice of International Crown Court of Justice, Global Chief Justice of International Crown Criminal Court for Abolition of Impunity, Global International Crown Managing Director,, Global International Crown Licensor of Judicial, Quasi-Judicial and Administrative Discretionary Public Powers, Global International Crown Trustee In Bankruptcy, Global International Crown Liquidator, Global International Crown Managing Controller, Global International Crown Receiver and Manager.

ANNEXURE 1

Australian Government

Deputy Chair, Australian Prudential Regulation Authority

The Australian Prudential Regulation Authority (APRA) is seeking exceptional candidates to fill the role of Deputy Chair.

As Australia's prudential regulator, APRA's mandate is to provide Australians with a safe and stable financial system. APRA is an independent statutory authority that supervises institutions across banking, insurance, and superannuation, and is accountable to the Australian Parliament.

The Deputy Chair will help lead APRA to deliver on its mandate while ensuring regulatory settings are efficient and proportionate. They will also undertake strategic engagement with stakeholders to support the resilience and stability of the financial system.

Ideal candidates will have experience at senior levels of leading complex organisations through change, and a proven ability to achieve results in a challenging environment.

This role will have significant experience in business, financial markets, financial services, law, economics, or accounting, with regulatory reform experience highly desirable.

This full-time role offers competitive remuneration as set by the Remuneration Tribunal and is based in Melbourne or Sydney.

For enquiries and applications:
Please email: APRA-DeputyChair2025@kornferry.com.

Your application requires a curriculum vitae (up to 4 pages) and a 'two-page pitch' describing how your skills and experience contribute to the role.

Applications close: 11.59pm AEDT, Sunday 16 November 2025.

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ANNEXURE 2

Australian Government

Chair, Australian Securities and Investments Commission

The Australian Securities and Investments Commission (ASIC) is seeking exceptional candidates to fill the role of Chair.

ASIC is Australia's integrated corporate, markets, financial services, and consumer credit regulator. By ensuring transparent, fair, and efficient financial markets, ASIC contributes to the economic prosperity and financial well-being of all Australians.

The Chair leads ASIC in fulfilling its statutory objectives, setting regulatory direction, and ensuring the integrity and resilience of Australia's financial system. The Chair also works closely with the Chief Executive Officer on financial, people and operational matters.

Ideal candidates for this role will have experience leading complex organisations through change, and a proven ability to achieve results in challenging environments with significant experience in business, financial markets, financial services, law, economics, or accounting. Regulatory reform experience is also highly desirable.

This full-time role offers competitive remuneration as set by the Remuneration Tribunal and is based in any Australian capital city.

For enquiries and applications:
Please email: ASIC-Chair2025@kornferry.com.

Your application requires a curriculum vitae (up to 4 pages) and a 'two-page pitch' describing how your skills and experience contribute to the role.

Applications close: 11.59pm AEDT, Sunday 16 November 2025.

1699NS_5744

INSIGHTS

Restructuring & Insolvency: Australia (2023)

DATE PUBLISHED
22 November 2022

READ TIME
79 mins

Read our Australian chapter on Restructuring & Insolvency. In this publication, our team provide an overview of the relevant laws and their application and discuss recent trends and developments including the inquiry into the effectiveness of Australia's corporate insolvency laws.

SHARE

RELATED SERVICES

Restructuring and Insolvency

Contents:

General

Legislation

The Corporations Act 2001 (Cth) (the Act) is the primary piece of federal legislation that governs the registration, administration, insolvency and reorganisation of companies incorporated in Australia. The Act prescribes, among other things, the manner to administer and regulate the winding up, liquidation,

Excluded entities and excluded assets

The Act governs the insolvency proceedings for all companies incorporated in Australia and companies incorporated or possessing separate legal personality in foreign jurisdictions that carry on business in Australia. It also governs building societies, credit unions and managed investment schemes. The provisions of the Act do not govern the potential insolvency proceedings for government agencies, state or federal corporate bodies, or entities created by statute that are not companies. The individual statutes creating these bodies will normally provide for their dissolution or winding up.

Public enterprises

There is no precedent in Australia for a government-owned enterprise becoming insolvent. Generally, each government- owned enterprise is established under a specific piece of legislation separate to the Act (be it federal or at a state or territory level). The relevant legislation will provide for the winding-up procedure and remedies creditors may have available (noting they are limited compared to a corporate insolvency). Creditors of public enterprises do have remedies; however, as the provisions vary from enterprise to enterprise, and as there has never been an actual example of these provisions being tested, it is difficult to generally comment on how such remedies work in practice.

Protection for large financial institutions

No.

Courts and appeals

The Federal Court of Australia and the supreme court of each state and territory have jurisdiction to hear matters relating to companies incorporated in Australia (which include insolvency matters and the prosecution of both civil and criminal offences arising from insolvency proceedings). Matters pertaining to debt recovery and monetary compensation can also be dealt with by other courts such as district courts, county courts and magistrates' courts within their jurisdictional limits. The judicial institutions have discretion to transfer matters between them if considered appropriate. It is generally only the Federal Court and the supreme courts that have jurisdiction to wind up a company. An appellant has an automatic right to appeal any final decision of the court, including an order for the winding up of a company. Three of the more common insolvency processes (voluntary administration, deeds of company arrangement and receivership) often have no court involvement.

amount to be provided by way of security is part of the court's discretion. The security may take a form that the court considers adequate to provide protection to the defendant and permits guarantees, charges or the provision of a bank bond to be made in lieu of more traditional payments.

Types of liquidation and reorganisation processes

Voluntary liquidations

Under the Corporations Act 2001 (Cth) (the Act), both the members of the company and the creditors have the option, under certain circumstances, to commence a voluntary winding up of a company. Neither procedure requires court sanction. The determinative factor for which a voluntary regime may be pursued is the company's solvency position.

A members' voluntary liquidation is a solvent winding up. It requires that the directors of the company make a declaration of solvency under section 494 of the Act. The declaration of solvency requires that the directors of the company must form the opinion, after an inquiry into the affairs of the company, that the company will be able to discharge its debts in full within 12 months of the commencement of winding up. This is coupled with a special resolution (ie, at least 75 per cent of votes cast by members entitled to vote on the resolution) of the members to wind up the company. A copy of this resolution must be lodged with the Australian Securities and Investments Commission (ASIC) within seven days.

A creditors' voluntary winding up arises when the company is in fact insolvent. It can occur in a number of circumstances, including in situations where a liquidator appointed by the members forms the opinion that the company is in fact insolvent. This will convert the process from a members' voluntary winding up into a creditors' voluntary winding up. A company may also enter a creditors' voluntary winding up where the directors determine that the company is insolvent and should be wound up or at the end of an administration if the creditors pass a resolution at the second creditors' meeting that the company should be wound up.

Voluntary reorganisations

The purpose and operation of voluntary administration is outlined in Part 5.3A of the Act. Voluntary administration has been compared to the Chapter 11 process in the United States; however, unlike the Chapter 11 process, voluntary administration is not an 'in situ' debtor process. In a voluntary administration, the creditors control the outcome to the exclusion of management and members. The creditors ultimately decide on the outcome of the company, and in practice, it rarely involves returning management of the company back to the former directors.

maximises the chances of the company, or as much as possible of its business, continuing in existence; or

results in a better return for the company's creditors and members than would result from an immediate winding up, if it is not possible for the company or its business to continue in existence.

There are three possible ways an administrator may be appointed under the Act:

by resolution of the board of directors that in their opinion the company is, or is likely to become, insolvent;

a liquidator or provisional liquidator of a company may, by writing, appoint an administrator of the company if he or she is of the opinion the company is, or is likely to become, insolvent; and

a secured creditor who is entitled to enforce security over the whole or substantially whole of a company's property may, by writing, appoint an administrator if the security interest is over the property and is enforceable.

An administrator has wide powers and will manage the company to the exclusion of the existing board of directors. Once an administrator is appointed, a statutory moratorium is activated that restricts the exercise of rights by third parties under leases and security interests and in respect of litigation claims. The purpose of this statutory moratorium is to allow the administrator the opportunity to investigate the affairs of the company, and either implement change or be in a position to realise value, with protection from certain claims against the company. A secured creditor with security over the whole or substantially the whole of the assets of the company has 13 business days following the appointment of the administrator to exercise its right under the security granted in its favour (ie, appoint a receiver).

There are two meetings over the course of an administration that are critical to the outcome of the administration. Once appointed, an administrator must convene the first meeting of creditors within eight

meeting is normally convened 20 business days after the commencement of the administration (this may be extended by application to the court). At the second meeting, the administrator provides a report on the affairs of the company to the creditors and outlines the administrator's views as to the best option available to maximise returns. There are three possible outcomes that canbe put to the meeting:

enter into a deed of company arrangement (DOCA) with creditors;

wind the company up; or

terminate the administration.

The administration will terminate according to the outcome of the second meeting (ie, either by progressing to liquidation, entry into a DOCA or returning the business to operate as a going concern (although this is rare)). When the voluntary administration terminates, a secured creditor that was estopped from enforcing a security interest because of the statutory moratorium becomes entitled to commence steps to enforce that security interest unless the termination is because of the implementation of a DOCA approved by that secured creditor.

A DOCA is effectively a contract or compromise between the company and its creditors. Although closely related to voluntary administration, it should in fact be viewed as a distinct regime, where the rights and obligations of the creditors and company differ from those under a voluntary administration.

A DOCA may incorporate terms that make its operation similar to a voluntary administration (giving similar rights to a deed administrator as a voluntary administrator), but may also provide for, inter alia, a moratorium of debt repayments, a reduction in outstanding debt and the forgiveness of all, or a portion of, the outstanding debt. It may also involve the issuance of shares and can be used to achieve a debt-for-equity swap.

Entering into a DOCA requires the approval of a bare majority of creditors, both by value and number voting at the second creditors' meeting. A DOCA will bind the company, its shareholders, directors and unsecured creditors. A validly passed DOCA can bind all creditors but does not prevent a secured creditor from dealing with their security interest so long as the secured creditor does not vote in favour of the DOCA.

Upon the execution of a DOCA, the voluntary administration terminates.

The outcome of a DOCA is generally dictated by the terms of the DOCA itself. Typically, however, once a DOCA has achieved its goal it will terminate. If a DOCA does not achieve its goals or is challenged by

A scheme of arrangement is a restructuring tool that sits outside of formal insolvency. The company may become subject to a scheme of arrangement whether it is solvent or insolvent.

A scheme of arrangement is a proposal put forward (with input from management, the company or its creditors) to restructure the company in a manner that includes a compromise of rights by any or all stakeholders. The process is overseen by the courts and requires approval by all classes of creditors. The pre-existing management retains control of the company during the process (and also depending on the terms of the scheme itself after its implementation). In recent times, schemes of arrangement have become more common, in particular, for complex restructures involving debt-for-equity swaps in circumstances where the number of creditors within creditor stakeholder groups may make a contractual and consensual restructure difficult.

A scheme of arrangement must be approved by at least 50 per cent in number and 75 per cent in value of creditors in each class of creditor. Classes are determined by reference to commonality of legal rights and only those creditors whose rights will be affected, compromised or amended by the scheme need be included. It must also be approved by the court to become effective. The test for identifying classes of creditors for the purposes of a scheme is that a class should include those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to a 'common interest'. The outcome of a scheme of arrangement is dependent on the terms of the arrangement or compromise agreed with the creditors, but most commonly, upon implementation, a company is returned to its normal state as a going concern but with the relevant compromises having taken effect.

The scheme of arrangement process does, however, have a number of limiting factors associated with it, including cost, complexity of arrangements (ie, class issues), uncertainty of implementation, timing issues (ie, because of various procedural requirements for holding the meetings, and as it must be approved by the court it is subject to the court timetable and can only be expedited to a certain extent) and the overriding issue of court approval (ie, a court may exercise its discretion to not approve a scheme of arrangement, despite a successful vote, if it is of the view that the scheme of arrangement is not equitable).

These factors explain why schemes of arrangement tend only to be undertaken in large corporate restructures and in scenarios with sufficient time for execution and implementation to accommodate the procedural and courts' requirements.

Successful reorganisation

A scheme of arrangement must be approved by a majority of creditors voting on the resolution and holding at least 75 per cent in value and 50 per cent in number of voting creditors in each class. Classes are

supplementary approval by the court is required at the second court hearing. Schemes of arrangement may provide for the release of third parties (as opposed to DOCAs where the courts have held that such releases are not possible).

In the context of a voluntary administration, a majority of creditors with at least 50 per cent in number and 50 per cent in value may resolve that the company should execute a DOCA. The company must execute the instrument within 15 business days of such a resolution. A DOCA can be varied by either a subsequent resolution of creditors or by the court. A DOCA will bind the company, its shareholders, directors and unsecured creditors. Unlike a scheme of arrangement, court approval is not required for a DOCA to be implemented provided it is approved by the requisite majority of creditors.

The High Court in Lehman Brothers Holdings Inc v City of Swan & Ors [2010] HCA 11 (Lehman Brothers), held that creditors were not bound by provisions in a DOCA that involved releases of claims against entities other than the company the subject of the DOCA.

This position was later followed by the Supreme Court of New South Wales in In the matter of Eastmark Holdings Pty Limited (receivers and managers appointed (subject to a deed of company arrangement) & ors [2015] NSWSC 2070, where the Court determined that third-party release clauses were severable for the following reasons:

the third-party releases were never intended to be part of the DOCA proposal in the first place and they were not in the proposal or discussed at the meeting of creditors;

Accordingly, the Court held that the third-party releases were void but severable, which allowed the DOCA to continue. These decisions support the general notion that claims against third parties cannot be released under a DOCA. Therefore, it is unlikely that a creditor will be bound by a DOCA to give up claims save for other than claims against the company the subject of the DOCA.

Involuntary liquidations

Under Australian law, a compulsory liquidation involves the application to, and orders from, the court. A creditor or other eligible applicant must lodge an application with the court to wind up a company. On an

There are two situations in which a company will be held to be unable to pay its debts:

- if the company has not paid a claim for a sum due to a creditor exceeding A$4,000 within 21 days of service of a prescribed written statutory demand (the Act sets out specific requirements); or

- if it is proved to the court as a question of fact that the company is unable to pay its debts as and when they fall due.

Grounds are also available for a creditor to apply to the court for winding-up orders against a company not necessarily related to solvency, including that it is 'just and equitable' to do so or because of a deadlock at shareholder or director level affecting the ability to manage the company.

After a winding-up order, management of the company is removed from the directors and the company will likely cease as a going concern (except as is necessary to proceed with the winding up). The liquidator appointed will take control of the affairs of the company, and his or her other duties include realising the company's assets for the benefit of the creditors as a whole.

There are no material differences between a liquidation ordered by the court and a creditors' voluntary liquidation.

In response to the covid-19 pandemic, the federal government introduced significant amendments to Australia's insolvency landscape via the Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth) (the Insolvency Reform Act). These amendments to the Act came into effect on 1 January 2021 and relate specifically to small businesses. As part of these amendments, a liquidator may adopt a new small business liquidation (SBL) process under section 500A of the Act instead of the general creditor's voluntary liquidation process, which is aimed at providing a quick alternative to a creditor's voluntary winding up.

This may be undertaken if the company has resolved to be wound up voluntarily, the directors have given the liquidator a report as to the company's affairs and declared that the company is eligible for the SBL process, the total liabilities of the company do not exceed A$1 million and the company has made all required tax lodgements.

In circumstances where the liquidator becomes aware that the eligibility criteria is no longer met or where the liquidator has reasonable grounds to believe that the company or any of its directors have engaged in

Involuntary reorganisations

Unlike in the United Kingdom, receivership is still an option available to secured creditors in Australia. Receiverships, particularly coordinated appointments at a holding company level, can and have been used to effect corporate restructures and reorganisations.

There are two ways in which a receiver or receiver and manager may be appointed to a debtor company. The most common manner is pursuant to the relevant security document granted in favour of the secured creditor when a company has defaulted and the security has become enforceable. Far less common in practice is the appointment of a receiver pursuant to an application made to the court. Court appointmen are usually done to preserve the assets of the company in circumstances where it may not be possible to otherwise trigger a formal insolvency process. However, given the infrequency of court-appointed receivers, this chapter focuses on privately appointed receivers.

For a privately appointed receiver, the security document itself will entitle a secured party to appoint a receiver and will also outline the powers available (supplemented by the statutory powers set out in section 420 of the Act). Generally, a receiver has wide-ranging powers including the ability to operate, sell or borrow against the secured assets. The appointment is normally effected contractually through a deed of appointment and indemnity, and the receiver will be the agent of the debtor company, not the appointing secured party.

On appointment, a receiver will immediately take possession of the assets subject to the security. Once in control of the assets, the receiver may elect to run the business if the receiver is appointed over all or substantially all of the assets of a company. Alternatively, and depending on financial circumstances, a receiver may engage in a sale process immediately. While engaging in a sale process, a receiver is under a statutory obligation to obtain market value, or in the absence of a market, the best price obtainable in the circumstances. This obligation is enshrined in section 420A of the Act.

It is this duty under section 420A of the Act that has traditionally posed the most significant stumbling block to the adoption of prepackaged restructure processes through external administration. Often referred to as a ‘prepack’, this is where a restructuring is developed by the secured lenders before the appointment of a receiver and is implemented immediately or very shortly after the appointment is made. There is a concern that a prepackaged restructuring that involves a sale of any asset without testing against the market could be seen to be in breach of the duty under section 420A. Sales processes conducted immediately before appointment or the potential for immediate dilution of value are increasingly facilitating receivership sales without a full testing of the market.

course.

The appointment of a receiver to all or substantially all of the assets of a company will usually lead to, or will closely follow, the appointment of voluntary administrators by the directors, with both processes proceeding in tandem.

A secured creditor can often appoint an administrator to effect a reorganisation as an alternative to exercising its security. Once the voluntary administration occurs, the creditors are in control of the company's fate (including any restructuring or reorganisation), the success of which will be dependent on the relevant majority, by number and dollar value, voting in favour of it.

Further to the SBL process, recent amendments to the Act also establish the framework for the small business restructuring (SBR) process under Part 5.3B. The SBR process enables eligible companies to engage a small business restructuring practitioner to develop and propose to creditors a restructuring plan that, if accepted, will bind the company and certain creditors. A company's eligibility for this process is dependent on whether it has liabilities of less than A$1 million, the company has paid the entitlements of its employees that are payable, its current or former directors (in the preceding 12 months) have not engaged the SBR process or SBL process (in respect of another company) within the past seven years and it is not currently subject to another form of external administration under the Act or other restructuring arrangements.

The SBR process follows the general structure and key features of voluntary administration under Part 5.3A of the Act but differs in that it follows a 'debtor-in-possession' model, which allows the directors to maintain control of the company.

Expedited reorganisations

There is no legislation that specifically facilitates prepackaged reorganisation in Australia.

That being said, it is possible under certain circumstances for an administrator or a receiver to give effect to sale transactions that have been negotiated to near completion before their appointment.

The voluntary administration regime was introduced into the Act to provide distressed companies with a process to initiate an expedited reorganisation without court approval. A voluntary administrator is required to complete the investigations relating to the company's business, property, affairs and financial circumstances about four to six weeks after his or her appointment. The administrator is then required to

The creditors then decide between three alternatives:

to execute a DOCA;

to wind up the company; or

to end the administration.

As administrators have the power to dispose of a debtor company's property under section 437A of the Act, it is possible for an administrator to effect prepackaged transactions in certain circumstances; that is transactions that have been negotiated to near completion before their appointment, before convening the second meeting of creditors. However, the scope of that power is subject to the objects of Part 5.3A of the Act, being that the sale maximises the chances of the company continuing or, if that is not possible, results in a better return for creditors and members than a liquidation. As such, practitioners are often reluctant to effect a quick sale where that sale may not meet these objectives.

As receivers also have the power to dispose of a debtor company's property under section 420(2)(b) of the Act, it is possible, in certain circumstances, to implement a prepackaged reorganisation. However, section 420A of the Act is the single largest impediment to receivers giving effect to a prepackaged reorganisation where Australian courts have construed that section with a focus on the process undertaken by the receiver to sell the property. The very nature, and indeed the key benefit, of a prepackaged transaction, is that it is a quick sale of the debtor company carried out soon after the appointment of the insolvency practitioner. This, therefore, poses two difficulties for a receiver. The first relates to timing. If the receiver had no pre-appointment involvement with the prepackaged transaction, it would be difficult to demonstrate they complied with their obligations as set out in section 420A of the Act. On the other hand, if the receiver did have pre-appointment involvement, that might contravene the strict independence requirements for insolvency practitioners in Australia. The second difficulty is the requirement to achieve market value or otherwise achieve the best price that is reasonably attainable, having regard to the circumstances existing when the property is sold. It may be difficult to demonstrate that market value has been achieved in an expedited prepackaged sale. This requirement places a heavier burden than that placed on receivers in the United Kingdom, who are only required to show they were not negligent in exercising their power of sale.

Unsuccessful reorganisations

A scheme of arrangement may either be defeated by a creditors' vote or if it is not sanctioned by the court. Should either of these occur, there is no automatic process that occurs; rather, the company reverts to its