A proposed reorganisation through a DOCA may be defeated by a majority of creditors at the second meeting. At this meeting, the creditors may vote for the company to be wound up or to give back control of the company to the directors, thus ending the administration, rather than executing a DOCA. Further, if the company fails to execute a DOCA within 15 business days of a successful resolution at a second creditors' meeting, the company will enter into a creditors' voluntary winding up. Once executed, if there is a material contravention of the DOCA by the debtor company, a creditor or other interested person may apply for the termination of an executed DOCA by an order of the court. If an order is granted, the company again enters into a creditors' voluntary winding up.

An aggrieved creditor might also look to terminate a DOCA on the grounds of, for example, unfair prejudice.

Corporate procedures

Deregistration can be voluntary upon the application of the company, a director, a member or a liquidator, and can be initiated by ASIC or court-ordered in circumstances where the company has no assets or liabilities, or its winding up has been finalised. Upon the deregistration of the company, it ceases to exist as a corporate identity.

Also, ASIC may unilaterally deregister a corporation if it has reason to believe that the company is no longer carrying on its business, has been fully wound up, has been at least six months late in lodging its annual return or has not lodged the relevant corporate documentation (including financial reports) required by the Act in the preceding 18 months. There is, however, a process under the Act for the reinstatement of deregistered companies in certain circumstances.

Conclusion of case

There are three outcomes of a voluntary administration upon which the creditors decide:

entering into a DOCA;

winding the company up; or

terminating the administration.

The outcome chosen will dictate how the voluntary administration ends. Once a DOCA is executed, the company comes out of voluntary administration, and if the administration terminates, the administrative

At the conclusion of a liquidation, the company is deregistered. The process of deregistration is regulated by Chapter 5A of the Act. After the company's affairs are fully wound up, the liquidator must produce an account showing how the

winding up has been conducted and the company's property disposed of. ASIC must deregister the company when three months have elapsed after the liquidator has lodged the account, or minutes if a final meeting is held, with ASIC.

In a compulsory winding up, the liquidator may also apply to the court, pursuant to section 480 of the Act, for an order that the liquidator be released and that the company be deregistered after the liquidator has:

- realised all the property of the company or so much of that property as can in his or her opinion be realised without needlessly protracting the winding up;
- distributed a final dividend (if any) to the creditors;
- adjusted the rights of the contributories among themselves; and
- made a final return (if any) to the contributories.

The court must be satisfied that no creditor will be adversely affected by the order.

A receivership concludes when the secured assets are realised and the secured creditors are repaid (either in full or where there are no further assets to realise, to the maximum extent possible). In such circumstances, control of the company is handed back to either the directors or voluntary administrator, and in most instances, the company is deregistered or wound up.

Insolvency tests and filing requirements

Conditions for insolvency

Section 95A of the Corporations Act 2001 (Cth) (the Act) states that a company is solvent if it can pay its debts as and when they become due and payable. A company that cannot pay its debts when due and payable, or in other words is not solvent, is insolvent.

reality of the company's financial position taken as a whole as opposed to a point-in-time assessment of the balance sheet taken in isolation.

Mandatory filing

When a company is insolvent or likely to become insolvent, its board of directors can appoint a voluntary administrator under Part 5.3A and the appointment itself is a defence under the Act to insolvent trading. There is, however, no explicit statutory provision obliging companies to commence such insolvency proceedings.

Directors and officers

Directors' liability - defences

Under section 588G of the Corporations Act 2001 (Cth) (the Act), directors have a duty to prevent insolvent trading. If a company enters into liquidation, Division 4, Part 5.7B of the Act makes directors who breach this duty liable to compensate the company for all new debts incurred from the time a company is found to have become cash-flow insolvent. Therefore, a director may suffer civil or criminal liability for insolvent trading where he or she knew, or had reasonable grounds for suspecting, that the company was insolvent or would become insolvent. These provisions are intended to compel directors to take active steps (eg, the appointment of a voluntary administrator) in an expeditious manner, thereby protecting members and creditors from the continuation of insolvent businesses.

In addition to the potential liability for directors, if the company continues to carry on business while insolvent, certain transactions that the company entered into with third parties during that time may be subject to challenge and ultimately be held to be void if the company formally enters into liquidation (eg, unfair preference or uncommercial transaction).

Directors' liability - other sources of liability

A director or officer of a company may be held liable under the Act for civil and criminal penalties or to compensate the company if the company incurs a debt while insolvent (otherwise known as insolvent trading). Directors and officers may also attract personal liability for breaching their statutory duties of reasonable care and diligence in the exercise of their powers and to act in good faith and for proper purposes. Statutory liability may also be imposed where directors or officers improperly use their position or information acquired because of their position to gain an advantage for themselves or cause detriment to the company.

details of the unpaid amount and the penalty. Directors may avoid a penalty if the company pays the unremitted amount, the company enters into an agreement relating to the unremitted amount, an administrator is appointed or the company goes into liquidation.

The courts maintain discretion under the Act to excuse directors from liability in some circumstances if they can be shown to have acted honestly and reasonably.

The statutory defences available to a director for a breach of the duty to prevent insolvent trading are set out in section 588H of the Act. A director is not liable for a breach of duty if it is proved that, at the time the relevant debt was incurred, the director had reasonable grounds to expect and did expect that the company was solvent at that time and would remain solvent even if it incurred that debt (as well as any other debts that it incurred at the same time).

Further, a director is not liable if it is proved that he or she took all reasonable steps to prevent the relevant debt from being incurred. In this context, the Act states specifically that matters to which regard is to be made in considering this defence include any action the director took with a view to appointing an administrator when such action was taken and the results of that action.

A breach of the duty to prevent insolvent trading by a director will expose that director to prospective liability for a civil penalty order, an order for payment of compensation to the company or an order for payment of compensation to the creditor. The amount of compensation awarded against a director who breaches such a duty will be calculated by reference to the actual loss that the company or the creditor suffers by reason of the debt being incurred. In ascertaining the quantum risk of a potential insolvent trading action, the question as to when a debt is incurred becomes important. Ordinarily, a director will not be liable for a pre-existing debt that falls due when a company is found to be insolvent. Rather, directors are liable if the debt is 'incurred' at a time when the company is insolvent.

Section 588GA of the Act affords directors protection in certain circumstances to enable a company to delay entering into a formal insolvency process and instead pursue a turnaround plan (ie, provide directors with a 'safe harbour' protection). Under this section, a director will not be liable for debts incurred by a company while it is insolvent if, 'at a particular time after the director starts to suspect the company may become or be insolvent, the director starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company' than the 'immediate appointment of an administrator or liquidator to the company'.

A director that seeks to rely upon section 588GA of the Act bears the evidential burden in relation to that matter. That is, adducing or pointing to evidence that suggests a reasonable possibility that the matter

certain reporting or taxation requirements. The new safe harbour provision also extends to providing a safe harbour for holding companies from liability to compensate its subsidiaries' creditors where directors of those subsidiaries hold the benefit of the safe harbour. Holding companies bear the same evidential burden as directors to adduce evidence that suggests a reasonable possibility that the company took steps to ensure that the directors did enjoy the benefit of the safe harbour provisions. We note that a court is yet to properly consider or opine on the operation of section 588GA.

While the introduction of this 'safe harbour' provision is seen as a positive development, section 588GA of the Act will not provide protection for directors against more general breach of duty claims.

As part of the 2021-22 Federal Budget, the federal government announced that it would commission an independent review of the 'safe harbour' provisions (as required under section 588HA of the Act) to examine and report on the operation of the safe harbour provisions. Appointed on 19 August 2021, the independent panel assessed whether the safe harbour provisions are achieving their aims, including giving financially distressed but viable companies more 'breathing space' to restructure their affairs. On 24 March 2022, the Federal Treasury tabled its review , relying on contributions from advisers, directors and other stakeholders. While the review notes that the assessment of the efficacy of safe harbour had been limited by the disruption caused by the covid-19 pandemic, recurring feedback from stakeholders included a view that awareness around insolvent trading and safe harbour ought to be increased, a need for a high-level reconsideration of directors' duties as they relate to corporate distress generally and the difficulties associated with adopting a single safe harbour framework to companies of all types and sizes. The review made various recommendations, including the following:

- amendments to the wording in the legislation to clarify the operation and application of the safe harbour provisions;
- extending safe harbour protection to cover transactions that avoid employee entitlements;
- development of a best practice guide to safe harbour in 'plain English' by the Treasury in consultation with key industry groups;
- that data on safe harbour utilisation be collected and reported on as part of the reports received from voluntary administrators and liquidators; and
- that the Treasury commission a holistic in-depth review of Australia's insolvency laws generally.

It remains to be seen whether these recommendations will be adopted.

In discharging their duty to act in good faith and in the best interests of a company, directors must have regard to the interests of the company's creditors as the company is nearing insolvency.

However, it is not an independent duty to creditors, and any claim must be brought by the company (or more likely, its external administrators).

Directors' powers after proceedings commence

Upon the appointment of a voluntary administrator or while the company is being wound up, company officers are not removed from office but, in general, they cannot, without the administrator or liquidator's written approval, perform or exercise a function or power as an officer of the company.

If the receiver is appointed over all or most of the assets of a company, the receiver effectively has control, although the directors still have certain responsibilities and duties, and may retain residual control.

Matters arising in a liquidation or reorganisation

Stays of proceedings and moratoria

The Corporations Act 2001 (Cth) (the Act) imposes an automatic stay on the enforcement of ipso facto clauses in certain contracts entered into on or after 1 July 2018. The automatic stay applies where one of the following insolvency events occurs in relation to a company:

- voluntary administration
- a receiver or controller is appointed over the whole or substantially the whole of the company's assets;
- the company announces, applies for or becomes subject to a scheme of arrangement to avoid a winding up; or
- the appointment of a liquidator immediately following an administration or a scheme of arrangement.

The automatic stay does not apply retrospectively (ie, for agreements entered into before the automatic stay provisions coming into force). Relevantly, the automatic stay does not apply to other types of contractual defaults (eg, if the company has failed to meet its payment or other performance obligations under the relevant agreement).

in the case of a scheme of arrangement: the stay will end within three months of the announcement, or where an application is made within that three months, when the application is withdrawn or dismissed by the court or when the scheme ends or the company is wound up;

in the case of a receivership or managing controllership: the stay will end when the receiver's or managing controller's control ends; and

in the case of a voluntary administration: the stay will end at the latest of when the administration ends or the company is wound up.

The scope of the automatic stay, specifically what contract types, rights and self-executing provisions are excluded by the automatic stay are set out in the Corporations (Stay on Enforcing Certain Rights) Regulations 2018 (the Regulations) and the Corporations (Stay on Enforcing Certain Rights) Declaration 2018 (the Declaration). The Regulations prescribe the types of contracts, agreements or arrangements that are excluded from the operation of the automatic stay and rights in those kinds of arrangements remain available to the parties to those arrangements should a trigger event occur. The Declaration declares the various rights (including self-executing clauses that, when executed, provides those rights) that are excluded from the operation of the automatic stay and those rights that remain available to the parties should a trigger event occur.

Under the ipso facto regime, contracts entered into before 1 July 2018 are exempted from the application of the automatic stay. However, there has been some uncertainty as to whether a novation, assignment or variation of contracts entered into prior to this date could result in the contract becoming subject to the ipso facto regime. Notwithstanding this uncertainty, contractual parties have continued to novate or vary contracts entered into before 1 July 2018 in an effort to avoid the application of the automatic stay.

The Regulations provide some clarification in this regard, specifically stating contracts resulting from novations, assignments and variations of contracts before 1 July 2018 are also excluded from the ipso facto regime where those novations, assignments and variations are made before 1 July 2023. This differs from the position in the exposure draft Regulations, which had previously not limited the exemption to the five-year period. Accordingly, contracts before 1 July 2018 will no longer be excluded from the application of the automatic stay after 1 July 2023.

The automatic stay does not prevent secured creditors from appointing a receiver during the decision period pursuant to section 441A of the Act (if they have security over the whole or substantially the whole of

As at 8 August 2022, the operation of the automatic stay has not been judicially considered.

During a receivership, no moratorium exists, and creditors may take action against the company including initiating court proceedings, but such actions are treated as unsecured claims (subordinated to the claims of the secured creditors who appointed the receiver). The receiver is likely to be in control of the company's material assets and is permitted to realise such assets for the benefit of the secured creditor only (any surplus is provided to the company and would be available for distribution to unsecured creditors).

In addition to the above-mentioned automatic stay, the Act provides for a moratorium over legal proceedings as an automatic consequence of a company entering into voluntary administration. Consequently, no legal proceedings can be initiated or proceeded with except with the administrator's written consent or leave of the court. An exception, however, is made in the case of criminal proceedings.

The above-mentioned automatic stay does not apply once or if a company executes a deed of company arrangement (DOCA). The automatic stay ends when the 'administration ends', that is, when a DOCA is executed by the company and the deed administrator. Accordingly, if a company does execute a DOCA and needs the protection of the automatic stay, then subject to limited exceptions, it will need to obtain court orders.

The automatic stay does not apply where a liquidator is appointed, unless the liquidation immediately follows an administration or a scheme of arrangement.

After the commencement of a winding up of a company, or after the appointment of a provisional liquidator, legal proceedings are not to be commenced or continued against a company without leave of the court, pursuant to section 471B of the Act. Secured creditors are generally granted immunity from this process by section 471C, assuming the validity of their security, as they remain entitled to realise their security despite the liquidation.

Where a statutory moratorium exists, while not determinative, a court is more likely to grant leave for a claimant to proceed against the company if there is a public interest aspect to the claim, such as in the case of claims brought by regulators for statutory breaches, or where the claimant will have access to insurance proceeds.

Doing business

This position differs, however, if the restructuring occurs within the context of a receivership or an administration. Control of the company is transferred from the directors to the administrator or receiver. An administrator has wide- ranging powers to carry on the business of the company where that is consistent with the purpose of the administration, whereas a receiver has wide-ranging powers provided for under the Act and the security agreement itself.

For the purposes of carrying on the business, the administrator has the power under section 437A to pay creditors who supply goods or services to the company after the company has gone into administration in preference to ordinary unsecured creditors. An administrator may seek directions from the committee of creditors or the court. Creditors may also apply for relief against the administrator, which could involve removal.

A receiver may continue to run the business as a going concern with a view to maximising the return available to the secured creditor. Services engaged (including the providers of goods and services) are treated as costs of the receivership and the preferential payment of these costs is provided for in the appointment document.

Generally, after formal insolvency proceedings are commenced, the power and roles of company officers are at the discretion of the insolvency administrator appointed (receiver, administrator or liquidator) who is ultimately responsible for those roles (eg, carrying on the business of the company). In an informal workout where there has been no formal appointment, the company officers continue to be able to exercise all powers unless otherwise agreed with creditors.

Post-filing credit

A voluntary administrator is given the power under section 437A of the Act to manage the affairs of the company and to raise loans on security over company assets to carry on the business of the company. The repayment of this credit is treated as an expense of the administration and is given statutory priority over ordinary unsecured creditors.

Whether a deed administrator has the power to raise loans will depend on the terms of the DOCA. The repayment of this credit will usually be treated as an expense of the deed administration and will be given priority over distributions to creditors.

Liquidators are expressly permitted to obtain credit under section 477, whether on the security of company property or otherwise, as far as is necessary for the beneficial disposal or winding up of the company. Such

The terms of the appointment document and section 420 of the Act provide receivers with wide-ranging powers (including the ability to borrow). These borrowings are treated as expenses of the receivership and are provided priority, or alternatively, the original security document may provide that this financing is to be afforded the same priority as the first-ranking security.

Obtaining financing and use of assets as security in a scheme of arrangement or an informal voluntary reorganisation is solely a matter for agreement between the company and its creditors.

Sale of assets

As noted, 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 under section 420A of the Act. Upon a sale, the receiver will transfer the assets free of security interests (a release will be provided by the appointing secured creditor) and often the terms of any inter- creditor arrangements will provide for the automatic release of subordinated security. In circumstances where an automatic release mechanism is not provided for, direct negotiations will need to take place with the secured subordinated creditors.

A voluntary administrator may sell assets, noting, however, it is not permitted to sell assets subject to security without consent (normally, a receiver will be appointed and have control over such assets). Administrators can apply to the court if this consent is not given and the court may make an order if it is satisfied that the secured creditor is adequately protected.

Liquidators appointed in the context of either voluntary or compulsory liquidations can sell or otherwise dispose of unencumbered property of the company without needing to seek approval from the court or other parties to the liquidation. The purchaser will acquire the assets unencumbered unless there are debts or liabilities passing to the purchaser as provided for in the sale documentation. If assets are encumbered, consent of the encumbrancer will be required unless a court directs otherwise.

A liquidator owes fiduciary duties to the company. In realising company property, a liquidator (or administrator) has a duty to obtain the highest possible price for the assets of the company, keeping in mind that the winding up should not be unnecessarily protracted. Property may be sold in any way the liquidator deems fit, including private contract and, usually, public auction. While creditors may purchase assets of the company, the purchase price will not be able to be set off against the debt owed to the creditor by the company. Instead, any funds raised by the sale of company property will be for the benefit of the creditors as a whole, to be distributed according to the relevant distribution rules.

or the provision of such release in associated finance and security documents.

In an informal reorganisation of a company, the conditions of the reorganisation and sale or use of assets are as negotiated with the relevant creditors.

Negotiating sale of assets

While there is nothing to prevent stalking horse bids, they seldom occur in the Australian context.

Credit bids are permissible under Australian law and are a means of pursuing loan-to-own strategies. The offer will be assessed in the context of the relevant sales process conducted and the nature of the insolvency administration to which the company is subject. Courts generally have limited involvement in assessing a credit bid (save as part of a scheme of arrangement or where a sale has been challenged). In these circumstances, the court will scrutinise the credit bid together with the situation generally, against other proposals received and in light of any sale process run (if required). There is no prohibition on an assignee of the original secured creditor making a credit bid (provided the assignment was valid under law).

Rejection and disclaimer of contracts

Liquidators are given the specific ability to disclaim property or uncommercial contracts under Division 7A, Part 5.6 of the Act. A liquidator can, subject to objections being made to the court by aggrieved parties, disclaim onerous property in writing. Court approval is required for disclaiming contracts as this is likely to adversely affect third-party interests. There are no specific provisions for disclaimers in a voluntary liquidation, although the court has wide powers to control these reorganisations and application can be made to the court.

Receivers and administrators are not given specific powers to disclaim contracts; they may, however, look to ignore contracts with any resulting damages claim being unsecured against the company (not the receiver or the administrator personally).

If the debtor (either acting by the insolvency administrator appointed or otherwise) breaches the contract after formal insolvency has commenced, then the aggrieved counterparty has all remedies available to it under contract law (including a claim for damages and any right to terminate). Any such damage will be an unsecured claim as against the debtor company itself and only in very limited circumstances will an order for specific performance be made against the debtor company.

Intellectual property assets

protection), where the debtor enters into a relevant formal insolvency process.

A company administrator's power under section 437A to carry on and manage the property of the business extends to the use of intellectual property granted under an agreement with the debtor. Likewise, a receiver, in the absence of a licensor exercising termination rights, may also continue to use intellectual property.

Personal data

There are no restrictions on the use of personal information or customer data that apply in an insolvency that would not have otherwise applied to use by the company in a solvent context. For example, while there are restrictions against the use of personal information under Australian privacy laws, those laws will generally not prevent the transfer of that information to a purchaser as part of the sale of the company's business.

An administrator's power under section 437A to carry on and manage the property of the business extends to the use of customer data collected by the company in its business. Likewise, a receiver, in the absence of specific contractual terms to the contrary, may also continue to use customer data collected by the company in the course of the business.

Arbitration processes

There are no restrictions under Australian law preventing a distressed company or its creditors from pursuing alternative dispute resolution options, such as arbitration or mediation. The success or willingness to engage in these procedures will obviously be dictated by the parties involved. These arrangements, however, are not without their limitations. For example, there is no obligation on creditors to agree to an informal arrangement and any one creditor can veto a proposed arbitration or mediation outcome if its rights with regard to the other creditors are directly affected (or act outside its restrictions). Its non-binding nature provides sufficient disincentive for creditors to consider these procedures, and it is rarely seen.

Courts will generally allow arbitration proceedings to continue while insolvency proceedings remain open to aid the just and expeditious resolution of creditors' claims.

Creditor remedies

Creditors' enforcement

mortgage) will normally grant the secured creditor the ability to appoint a receiver. Once appointed, the receiver will realise the company's assets solely for the benefit of the secured creditor to the exclusion of the rest of the company's creditors. A creditor may also exercise rights as mortgagee in possession and take control of the property with a view to realising value.

Retention of title clauses are another way a creditor may enforce proprietary and contractual rights outside court proceedings. If effective, this will allow the creditor to reclaim property supplied to the company in the event of the company's receivership, administration or liquidation. Retention of title clauses fall within the definition of 'security interest' under the Personal Property Securities Act 2009 (Cth) (PPSA) and are therefore required to be registered under the provisions of the PPSA. A traditional retention of title arrangement will be considered a 'purchase money security interest' under the PPSA, and, upon registration, will give the holder priority over other registrable interests. In this sense, while the requirement for enforcing a retention of title clause will change, the effect shall remain the same.

A number of common law and statutory liens are also available (and do not require registration under the PPSA).

Unsecured credit

A creditor may commence proceedings through the courts to recover outstanding amounts owing by a recalcitrant debtor company. A creditor, at the same time, may also request that the court order injunctive relief to freeze the assets of the company if there is a risk of assets or value being dissipated. A failure to plead a substantive defence will generally enable a default judgment to be granted and the creditor may, after this, take steps to wind the debtor company up.

The court has extensive powers to compel compliance and enforce a range of remedies including seizure of assets, diversion of a debtor company's income and orders for winding up of the company. Foreign creditors may be required to provide security for costs (ie, a sum of cash to the courts) of enforcing a judgment in Australia.

The options available to unsecured creditors of an insolvent company or company in distress are limited. Once a company is placed into administration or liquidation, a statutory moratorium will apply to any proceedings commenced, including any enforcement proceedings.

Creditor involvement and proving claims

Notice of the appointment of an administrator must be lodged with the Australian Securities and Investments Commission (ASIC) within one day and creditors must be notified of the appointment within three days.

The administrator must convene a meeting of creditors within eight business days of his or her appointment. Notice of this meeting must be given in writing to as many creditors as is reasonably practicable at least five business days before the meeting and published on ASIC's insolvency notices website. At this meeting, creditors have the opportunity to appoint a different administrator and may also decide whether to appoint a consultative committee of creditors to assist the administrator. Although the committee cannot give directions to the administrator, it can compel the administrator to report on matters relating to the administration. The committee is also in a fiduciary relationship with the creditors and thus cannot profit from their role.

The second creditors' meeting must be convened by the administrator within five business days after the convening period. The convening period is 20 business days from the date the administration begins, and the same notice requirements apply. This is extended to 25 business days if the administration begins in December or occurred less than 25 days before Good Friday. The notice of the meeting must be accompanied by a report setting out the company's business, property, affairs and financial circumstances and a statement expressing the administrators' opinion on each of the options available to the creditors (executing a deed of company arrangement (DOCA), returning control of the company to the directors or winding up the company). If the administrator proposes a DOCA, details of the proposed DOCA must also be provided. At the meeting, the creditors decide and vote on which of the three available options they wish to pursue. The administrator presides at both the first and second meetings.

The reporting obligations of an administrator include the following:

- lodge notice of appointment with ASIC by the next business day following appointment, and publish on ASIC's insolvency notices website within three business days;

- prepare and lodge a report with ASIC where it is suspected that an officer, employee or member of the company has committed an offence in relation to the company; and

- where the creditors vote to wind up the company, to lodge a copy of that resolution with ASIC within five business days of it being passed.

In a creditors' winding up, no meetings of creditors are automatically held. A liquidator must hold a meeting if requested by a creditor with a minimum percentage of overall debt by value and if the liquidator considers

property to hold the meeting, a meeting of creditors dealing with the same matters has been held or will be held within 15 business days, or if the request is vexatious.

A liquidator must send to creditors:

- within 10 business days of their appointment, notice of their appointment, information about creditors' rights, and a summary of the company's affairs and information about the company's creditors;
- within three months of their appointment, a statutory report that includes information about the estimated assets and liabilities of the company, inquiries undertaken and to be undertaken by the liquidators, the likelihood of receiving an interim dividend and possible recovery actions; and
- any other reports the liquidator decides or that are reasonably requested by creditors.

These notices and reports must be lodged with ASIC.

During a receivership, there is no obligation to call a creditors' meeting but notice of the appointment must be lodged with ASIC. Reports must be lodged with ASIC during the receivership and notification must be given on its termination.

Creditors of a company in administration or liquidation have a right to request information at any time. An administrator or liquidator must provide the information required if the information is relevant to the administration or liquidation, the provision of the information would not cause the administrator or liquidator to breach their duties, and if the request is reasonable. A request for information would not be reasonable if complying with the request would prejudice the interests of one or more creditors or a third party, if the information is the subject of client legal privilege or disclosure would be actionable for breach of confidence, if the request is vexatious, if there is not sufficient property to comply with the request, or the information has already been provided or is required to be provided within 20 business days of the request. In relation to the last three reasons, the administrator or liquidator will still have to provide the information if the creditor meets the cost of complying with the request.

Creditor representation

Committees in the Australian insolvency regime are creatures of statute and are not seen in the context of representing creditor stakeholder groups as they might be in the United States.

In such a case, the liquidator must call separate meetings of creditors and members for the purpose of determining whether a committee of inspection should be appointed and, if a committee is to be appointed, the numbers of creditors and members to be appointed and the persons who are to be members of the committee.

In a voluntary administration, a committee of inspection may be formed at the first creditors' meeting.

The role of the committee of inspection is to supervise and assist the administrator or liquidator. Examples of the types of direction the committee may make include approving the remuneration of the administrator or liquidator, approving the institution of legal proceedings on behalf of the company, and directions as to the compromise of debts owing to the company. Committees of inspection are most often used in large liquidations or administrations where it is difficult for the liquidator to engage with the entire body of creditors on a regular basis.

The committee must have at least two members, drawn from the body of creditors and members. A company can be a member, acting through an authorised agent. Generally, the members of the committee of inspection will comprise those with a substantial interest in the winding up of the company, such as large creditors, employees and members holding a large proportion of the company's shares.

The administrator or liquidator of the company must have regard to the directions of the committee but is not required to comply with these directions.

Members of the committee of inspection owe the general body of creditors and members fiduciary duties and therefore must act in the best interests of the creditors and members rather than for their own benefit.

There is no statutory provision governing the remuneration of the committee of inspection. Except with leave of the court, a committee member may not derive any income from their position. They also must not become the purchaser of any property of the company.

It is almost unheard of for such committees to retain counsel and advisers.

Enforcement of estate's rights

An administrator, liquidator or provisional liquidator can sell or otherwise dispose of, in any manner, all or any part of the property of the company. As a claim available to an estate forms part of the company's property, a liquidator may assign the claim to a creditor for consideration. The beneficiary of the 'fruits of

be pursued for the benefit of all creditors. In such circumstances, the creditors providing the indemnity or funding may be entitled to receive a higher dividend than they would otherwise receive by operation of section 564 of the Corporations Act 2001 (Cth).

In addition to administrators' and liquidators' power to assign causes of action, third-party litigation funding has been increasing in acceptability and prevalence since the endorsement of the practice in the non-insolvency context by the High Court of Australia in Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386. This has brought with it increased access to litigation funding for liquidators and administrators.

Claims

A liquidator will notify creditors of the submission date and may do so by advertising it in a newspaper and also on the centralised insolvency notice website. This date may not be less than 14 days after the date of notice being given to creditors. Once the particulars of a debt are submitted by a creditor, the liquidator may admit:

- all or part of the claim;
- reject all or part of the claim; or
- require further evidence to be submitted in support of it.

If further evidence is required, the liquidator must notify every creditor in writing of the day on which the formal proof must be submitted. A liquidator must deal with submitted formal proof of claims within 28 days of receipt.

Where a proof of debt is rejected by a liquidator, grounds for the rejection must be provided to the creditor within seven days. A creditor can appeal the liquidator's decision in court within the time specified in the notice (at least 14 days after service).

It is possible for a creditor's claim to be assigned in writing. An assignee may apply to the liquidator and the court to have its new proof of debt stand as substituted for the assignor's proof of debt. Such an assignee will be able to enforce the full value of the claim irrespective of whether it was acquired at a discount (ie, below par).

date of winding up or refer the question to the court for judicial consideration.

A creditor aggrieved with the estimate made by the liquidator may appeal to the court. If the contingent event occurs after the date of winding up, the creditor is entitled to prove for the actual amount of the claim.

A creditor can claim for interest accrued after the opening of the insolvency case and there is a prescribed rate in the Act of 8 per cent. Payment of this interest will rank behind all other claims (except subordinated equity claims).

In attempts to counter illegal phoenixing, amendments were made to the Insolvency Practice Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights) Rules 2018 (the Amending Rules) to prevent the 'stacking' of related creditor votes and, accordingly, the ability for phoenix operators to control the appointment and replacement of an external administrator of a company.

The Amending Rules introduced two principal amendments to the Insolvency Practice Rules:

- the insertion of 75-95(1A) providing a requirement for an external administrator to ask any creditor voting an assigned debt for evidence of the debt and the consideration for the assignment; and

- the insertion of 75-110(7) providing a regime by which the value of any related creditor vote of an assigned debt is to be calculated as the value of the consideration given for the assignment.

Accordingly, where the consideration given by a related creditor for the assigned debt is less than the value of the debt, the value of the vote will be limited to the consideration given and not the full value of the debt. As such, external administrators are positively required to call for appropriate evidence of assigned debts and appropriately calculate the value of assigned debts for voting purposes.

Set-off and netting

Set-off refers to the right of a creditor to plead a debt due from the debtor as a defence to all or part of the debtor's claim made against it. Section 553C of the Act provides that statutory set-off is available in a liquidation scenario where there have been mutual dealings between the distressed company and the relevant creditor. In such circumstances, an automatic account is taken of the sum due from one party to the other in respect of those mutual dealings and the sum due from the one is to be set off against any sum due from the other.

preference over the general body of creditors. Only creditors that choose not to rely on their security may take advantage of the rule.

A creditor is, however, unable to claim the benefit of set-off if he or she had, at the time of the relevant transaction, notice of insolvency of the company. Further, a creditor cannot offset any existing claim or debt of the company against new claims or debts that may arise during the period of administration.

In other reorganisations, there is no statutory right of set-off and the creditor must rely on any contractual rights they may have. Those rights will be subject to a statutory lien that has attached to the company's property at the time that the set-off is made. In practice, however, administrators and deed administrators will ordinarily recognise set off as if section 553C did apply, as generally creditors can claim prejudicial treatment if they receive less from administrators or under DOCAs than they would under a liquidation scenario (and often wording similar to section 553C is built into a DOCA).

Modifying creditors' rights

Generally speaking, unsecured claims rank pari passu (with some exceptions), with secured creditors afforded a level of priority by virtue of the security arrangements in place.

The court has power to change the rank of a creditor's claim in only very limited circumstances. Section 564 of the Act provides an incentive to creditors to give financial assistance or indemnities to liquidators to pursue asset recovery proceedings or to protect or preserve property. If creditors provide such assistance, the liquidator may apply to the court for an order that the contributing creditors receive a higher dividend from the company's assets than they would otherwise be entitled to.

In assessing any claim under section 564, the court will consider all the circumstances surrounding the claim. Therefore, it is difficult to assess the frequency and likelihood of success attributable to any individual claim. The courts, in exercising their discretion, will have particular regard to factors such as the amount of risk to creditors, the amount recovered and the proportion between the debts of participating creditors and others, as well as the public interest in encouraging creditors to provide indemnities to enable assets to be recovered. Litigation funding can also be obtained outside the court process.

A DOCA may determine the creditors to be paid and how much they are to be paid (noting that a level of protection is afforded to employees unless they agree otherwise). Aggrieved creditors can apply to the court to overturn a DOCA if they are discriminated against.

Priority claims

liquidator in realising the assets of the company and in carrying on the company's business and the costs in relation to any applications to the court in respect of the winding up and employee-related entitlements.

A company's debts to the Commonwealth government do not receive any special priority. Amounts in respect of unpaid income tax rank as unsecured debts and are payable only if there are sufficient funds left over after all preferential debts have been paid.

Certain employee entitlement claims will have priority over secured debts, which are secured by a security interest of circulating assets (ie, receivables and stock, etc).

Employment-related liabilities

Outstanding employees' wages, superannuation, leave entitlements and redundancy payments are given priority over payment of ordinary unsecured creditors in the distribution of assets in the winding up. Pursuant to the Commonwealth's Fair Entitlement Guarantee (FEG), when a company is placed into liquidation leaving employee entitlements unpaid, the Commonwealth government, through FEG, can make payments to employees of certain levels of unpaid wages, leave and other entitlements. The Commonwealth then becomes a creditor of the company and is afforded the same priority in the distribution as the employee claims it paid.

Upon the making of a winding-up order by the court, the publication of that order acts as a notice of dismissal of all employees of the company. An employee who was engaged subject to a contract of employment for a fixed term, or was entitled by his or her contract of employment to a period of notice before termination of the contract, may lodge a proof of debt for damages for breach of contract. While the appointment of a voluntary liquidator does not necessarily operate as a notice of dismissal, the liquidator has the power to terminate contracts of employment.

In relation to a company in administration and receivership, upon appointment, the administrator or receiver takes control of the company's business, property and affairs. The retention of employees will depend upon the outcome of the administration process. If the business continues to operate, employees may be retained. An administrator and receiver can also terminate employment contracts in the same way as management of the company could when the company was operating as a going concern.

The Act affords a level of protection to employee entitlements following the company and its creditors entering into a DOCA. The Act provides that the entitlements of employees be given certain priorities in a deed, those priorities to be at least equal to what they would receive if the company were being wound up.

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.

18/12/2006		Hearing before Justice Anderson Scheduled Hearing Date: 19/12/2006 AT 9:45am	
19/12/2006		Outcome: Hearing	
		Reserved Judgment Delivered (Non Finalising) His Honour did this day order that: 1. The appeal is dismissed; 2. The question of costs is reserved; and 3. The matter be adjourned to 9 a.m. on Wednesday 10 January 2007 for argument as to costs. Presiding Officer The Honourable Justice Anderson For Plaintiff 1, 2 : No Appearance Plaintiff For Defendant 1 : Dr R J Baxter For Defendant by Counter Claim 1 : No Appearance Defendant	
20/12/2006	283	Notice for Specific Directions leave to file application 10.1.07 9.00am	BY: DCC 1
20/12/2006	284	Affidavit Of Facts a m garrett ex.284	BY: DCC 1
20/12/2006		For Argument Scheduled Hearing Date: 10/01/2007 AT 9:00am	
22/12/2006	285	Short Form Claim for Costs	BY: D 1
04/01/2007	286	Reasons For Judgment (non-finalising) anderson j 19.12.06 sasc 381	
09/01/2007		Hearing before Justice Anderson Scheduled Hearing Date: 10/01/2007 AT 9:45am	
10/01/2007		Outcome: Hearing	
		Order - Unclassified His Honour does this day order that: 1. in relation to the action number 127-04, in respect of the judgment delivered by me on 19 December 2006, that there be an order that Mr Garrett pay the costs of the respondent to be taxed; 2. no order be made in respect of paras 5 and 6 of the notice for specific directions dated 18 December 2006.	

Mr Garrett withdraws paras 3 and 4 of the notice for specific directions dated 18 December 2006 with intimation, by counsel for the Bank, that t here will be no application for costs in respect of those two paras.
Presiding Officer The Honourable Justice Anderson
For Plaintiff 1, 2 : No Appearance Plaintiff
For Defendant 1 : Dr R J Baxter
For Defendant by Counter Claim 1 : Mr A M Garrett
For Defendant by Counter Claim 2, 3 : No Appearance
For Intervener 1 : Mr D Mackintosh

10/01/2007 289 Other Documents
Ruling made by the Honourable Justice Perry

17/01/2007 287 Outline Of Submissions BY: PL 1,2

17/01/2007 288 Affidavit Of Facts BY: D 1
E D Thomson ex 288a-b

19/01/2007 Hearing
before Justice Anderson
Scheduled Hearing Date: 22/01/2007 AT 10:00am

22/01/2007 Outcome: Hearing

Order - Unclassified

His Honour does this day order that orders be made pursuant to the terms of the Minutes of Orderthis day initialled by me as follows:

1. Until further order, Andrew Morton Garrett is prohibited from:

1.1 instituting in his own name;

1.2 causing others to institute;

1.3 being concerned whether directly or indirectly in the institution of; or

1.4 continuing

any proceedings (whether civil or criminal) in any Court of the State of South Australia against the defendant, Sunburst Properties Pty Ltd (Receivers & Managers appointed) (In Liquidation) ("Sunburst"), or any related body corporate, officer, employee, agent, adviser, receiver, receiver and manager or liquidator (or any of their partners or staff) (including any former officer,employee, agent, adviser, receiver, receiver and manager or liquidator (or any of their partners or staff) of the defendant or Sunburst, without the leave of this Honourable Court.

Mr Garrett indicated that he consented to the orders.
Presiding Officer The Honourable Justice Anderson
For Plaintiff 1, 2 : No Appearance Plaintiff
For Defendant 1 : Mr M Livesey QC with Ms E Thomson
For Defendant by Counter Claim 1 : Mr A M Garrett in Person
For Defendant by Counter Claim 2, 3 : No appearance
For Intervener 1 : Mr D Mackintosh

29/01/2007 290 Order with Injunction - Continuing BY: D 1

23/02/2007 Hearing
before Justice Perry
Scheduled Hearing Date: 26/02/2007 AT 10:30am

26/02/2007 Outcome: Hearing

Judgment Reserved (Finalising)

Presiding Officer The Honourable Justice Perry
For Plaintiff 1, 2 : Plaintiff in Person
For Defendant 1 : No Appearance Defendant
For Defendant by Counter Claim 1-3 : Defendant in Person
For Intervener 1 : No Appearance Other Party

Order - Unclassified

1 Judgment reserved.

09/03/2007 Outcome: Hearing

Reserved Judgment Delivered (Finalising)

Presiding Officer The Honourable Justice Perry
For Plaintiff 1, 2 : No Appearance Plaintiff
For Defendant 1 : No Appearance Defendant
For Defendant by Counter Claim 1-3 : No Appearance Defendant
For Intervener 1 : No Appearance Other Party

Order - Unclassified

1 Application for leave to appeal dismissed.

Reasons published out of chambers. Parties not required to attend.

14/03/2007 Hearing
Perry J-reasons published x chambers-no appearances req'd
Scheduled Hearing Date: 09/03/2007 AT 9:00am

15/03/2007 291 Reasons For Judgment (non-finalising)
PERRY J, 9.3.2007, SASC 89

15/03/2007 292 Order Dismissing Appeal BY: PL 1,2

16/05/2007 Hearing
before Justice Anderson
Scheduled Hearing Date: 17/05/2007 AT 9:15am

17/05/2007 Outcome: Hearing

Reserved Judgment Delivered (Non Finalising)

Presiding Officer The Honourable Justice Anderson
For Plaintiff 1 : Mr A M Garrett in person
For Plaintiff 2 : No appearance
For Defendant 1 : Mr M Livesey QC
For Defendant by Counter Claim 1 : Mr A M Garrett in person
For Defendant by Counter Claim 2, 3 : No appearance
For Intervener 1 : Mr D Mackintosh

Order - Unclassified

His Honour did this day order that:

1. I allow the application by the National Australia Bank.
2. A declaration be made that Mr Andrew Morton Garrett has persistently instituted vexatious proceedings as defined by s 39(1) of the Supreme Court Act.
3. Mr Garrett should be prohibited from instituting in his own name, causing others to institute, or being concerned whether directly or indirectly in the institution of any proceedings in any Court of the State of South Australia against NAB or Sunburst Properties Pty Ltd (Receivers & Managers Appointed) (In liquidation), (Sunburst Properties) or any related body corporate, officer, employee, agent, adviser, receiver, receiver and manager or liquidator (or any of the partners or staff) of the defendant or Sunburst, without the leave of this Honourable Court.
4. Supreme Court Action No. 127 of 2004 is dismissed subject to the taxation of outstanding costs orders.
5. Supreme Court Action No. 1767 of 2003 is dismissed subject to the taxation of outstanding costs orders.
6. I adjourn the question of costs and further consideration of this matter to 9.15am on Wednesday, 30 May 2007.

21/05/2007 Hearing
Before Anderson J
Scheduled Hearing Date: 30/05/2007 AT 9:15am

I certify the above to be a true and correct Copy of Record of the Supreme Court of South Australia

Dated this 21st day of May, 2007

Registrar

NATIONAL AUSTRALIA BANK (NAB)

1. Refer Statement dated 24/03/ 2010 for more detail of this matter.

2. Initial involvement with NAB

In November 2000, I engaged with NAB as a Banker for a vineyard development known as Braidwood Vineyard at Mt Jagged, SA.

Later, in 2001, I arranged a competitive tender for the banking business of the Braidwood and Sunburst entities between NAB, St George Bank/ Bank SA, **(Bank SA)** NM Rothschild & Sons (Australia) Limited **(NMR) ,** Westpac**(Westpac)** and Rabo Bank**(Rabo)** though the auspices of Andrew Sandow Office Management.

In January 2002 NAB provided an indicative letter offering 65% LVR on which basis I decided to pursue their offer.

Subsequently an internal bank document describing the banking proposal was circulated in the Bank citing the value of the deal at $14 million and entitled Top 10 sales funnel deal- Information sheet.

In the ensuing negotiation process NAB made representations that I should consolidate my banking business with them as it would make my life simpler. Subsequently on the 16th May a credit submission was authorised by NAB.

3. The NAB financing

A formal letter of Offer in the amount of $10,350,000 was finally accepted by me in May 2002 which proceeded to settlement in stages.

4. Stage 1 was:

a. An advance of $1,500,000 made to The Trustees of the Andrew Garrett Family Trust **(AGFT)** and was ***intended to be secured*** by a Mortgage over the property known as "Springwood Park" **(SP).** ***For the reasons that follow this was not possible.***

That property (SP) was owned by Averil Garrett **(AGG)** as to 3 undivided 26th parts in respect of the section of land occupied by our principal place of residence, and the remaining 23 parts by Andrew Garrett Wine Resorts P/L in its capacity as Trustee of the Springwood Park Unit Trust **(SPUT).**

100% of the units issued in SPUT were owned by Andrew and Averil Garrett in their capacities as Trustees of the AGFT.

b. A further $4,120,000 in respect of Stage 1 Finance was also advanced by NAB pursuant to a 1st Bill facility Letter of Offer in favour of Sunburst Properties **(Sunburst)** dated 28th June 2002.

This amount was secured by mortgages over the Vinescape/Whisson assets (amongst other securities including debentures and guarantees) that were purchased with the advance from the vendors, along with a deposit to be paid in respect of the Gelnhurst assets;

i. KPMG (Adelaide) as receivers and managers of Vinescape and Alexandrina Water as vendors of the Vinescape Assets being ;
   - 75 acres of Vineyards planted on 1200 acres of land
   - 7.5 kilometre pipeline
   - Homestead buildings and shedding.
   - Filtration Manifolds
   - Easements, Leases, licenses to occupy
   - Coleambally farm 652, NSW
   - Irrigation license 2512
   - Irrigation License 2702

- Irrigation license 2632
- 601 shares in the Coleambally Irrigation Co-operative

ii. Mark Whisson and Philip Marshall as Vendors of the Whisson Assets;

- La BBQ vineyard 160 acres of vineyard
- Mt Carey Vineyard
- $750,000 plant & equipment
- 20% interest in Colton Vineyard
- Trig Point Viticulture Management Customers
- Personnel & Intellectual Property
- Head Office Furniture and effects $100,000

c. Continuation of $1,750,000 Facility made available to Sunburst Holdings Pty. Ltd **(Holdings)** in January, 2002.

5. Stage 2 was to be an advance of $3.6 million (with $350,000 deposit already paid) for acquisition of assets known as the Glenhurst assets, pursuant to a contract of purchase executed on 15 February 2002.

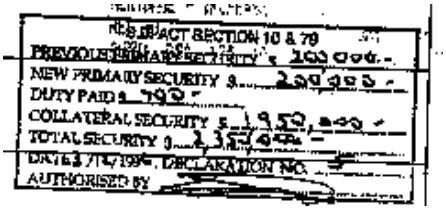
6. Variation of Stage 2 In September 2002 NAB convinced me to withdraw from the Glenhurst acquisition and instead acquire the property known as Old Stornoway from their agent Colin Nichol of McGrath Nichol. NAB agreed to advance 100% of the funds for the purchase, leasehold equipment and operating capital.

Securitisation of Stage 1

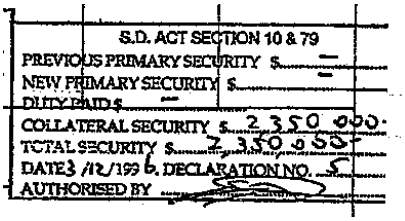
6. The advance of $1.5 million under Stage 1 was to enable the payout of existing loans, and for other purposes, specifically:
   a. $344,000 was to be used to pay out that amount owed to St George Bank/BankSA by the AGFT, that was then secured by a first Registered Mortgage No 8213956 over SP. **(BankSA Mortgage)**
   b. $600,000 was to be paid to NM Rothschild & Sons (Australia) Limited in consideration of the execution of Deed of Priority to allow NAB priority in respect of the second registered Mortgage No 8909699 **(NMR Mortgage)**
   c. $536,000 for other purposes including the deposit on the Vinescape assets.

The 1st NAB Mortgage

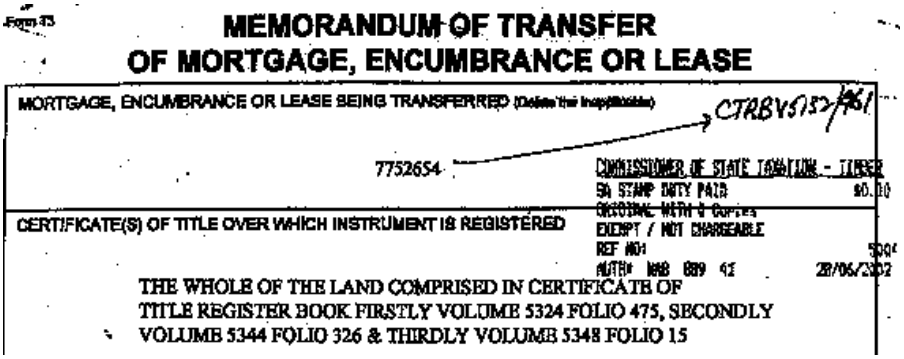
7. NAB Mortgage No 9374752 **(1st NAB Mortgage)** over SP was given as security in respect of a Bill Facility Letter of Offer dated 11th June 2002 in favour of AGFT **(the 1st AGFT Bill facility).** Upon registration, this mortgage became the second registered mortgage following the discharge of the BankSA Mortgage which occurred concurrently.
   a. On settlement of the 1st AGFT Bill Facility the NMR Mortgage advanced to become the 1st Registered Mortgage over SP as the Bank SA mortgage was unconditionally discharged.
   b. During the first week of June 2002 it was represented to me by officers of NAB that it would be cost effective and for the benefit of AGFT if BankSA were to transfer/assign the Prime Stamped BankSA mortgage to NAB as the Stamp Duty already paid on that mortgage could be used as a credit against the Stamp Duty Assessment for the 1st NAB Mortgage resulting in a saving of money to AGFT.
   c. From discovery provided to me on the 29th September 2004 (5 days after my sequestration) and communications evidenced in that discovery between NAB officers and bank SA officers it is apparent that there was significant confusion in NAB as to the level of stamp duty paid on the BankSA Mortgage and indeed which mortgage should actually be assigned to NAB by BankSA.
   d. At this time the NAB officers realised that "The Prime Stamped BankSA mortgage" that was subject of their communications with bank SA was in fact Mortgage No 7752654 **(the Arranmore Mortgage)** and that this mortgage was never registered over SP.
   e. The Arranmore mortgage was the only remaining BankSA Prime Stamped security and was stamped as follows;



f. The BankSA mortgage was only ever stamped as a collateral security as follows;


S.D. ACT SECTION 10 & 79
PREVIOUS PRIMARY SECURITY $ —
NEW PRIMARY SECURITY $ —
DUTY PAID $ —
COLLATERAL SECURITY $ 2 350 000
TOTAL SECURITY $ 2 350 000
DATE 3 /12/1996 DECLARATION NO.
AUTHORISED BY

g. A memorandum of transfer of Mortgage executed by the registered proprietors of the property known as Springwood Park dated 24th June 2002 prepared by NAB officers describes the Arranmore mortgage as being an instrument registered over SP***(which was not the case)*** and relevantly sets out;


Form 43
MEMORANDUM OF TRANSFER OF MORTGAGE, ENCUMBRANCE OR LEASE

MORTGAGE, ENCUMBRANCE OR LEASE BEING TRANSFERRED (Delete the inapplicable)

CTRBV5132/961

7752654

COMMISSIONER OF STATE TAXATION - TURNER
SA STAMP DUTY PAID $0.00
ORIGINAL WITH 2 COPIES
EXEMPT / NOT CHARGEABLE
REF NO:
AUTH: NAB 089 41 28/06/2002

CERTIFICATE(S) OF TITLE OVER WHICH INSTRUMENT IS REGISTERED

THE WHOLE OF THE LAND COMPRISED IN CERTIFICATE OF TITLE REGISTER BOOK FIRSTLY VOLUME 5324 FOLIO 475, SECONDLY VOLUME 5344 FOLIO 326 & THIRDLY VOLUME 5348 FOLIO 15

h. NAB officers were aware at the date of registration of the memorandum of transfer of the Arranmore mortgage on the 28th June 2002 that this mortgage was not registered over SP .....being the Land set out in the description of the certificates of title over which the instrument was purported to be registered, subsequently NAB officers sought to conceal their error in an act of Fraud.

i. It appears from the hand amendments on the face of the document being ***the arrow and the CT reference "CTRBV5132/961"*** that the solicitors for the bank (Johnson Winter & Slattery) in the preparation of their advice (prior to July 2003) also realised that the land had been incorrectly described and that the NAB securities were fatally flawed. Alternatively it is possible that these notes were affixed at some earlier time by NAB officers and that this could have predated December 31st 2002.

j. A few days earlier a Deed of assignment of Debt and Security dated 21st June 2002 prepared by NAB officers was also executed in respect of the Arranmore Mortgage between BankSA and NAB which correctly describes the land over which the Arranmore Mortgage was registered as follows;

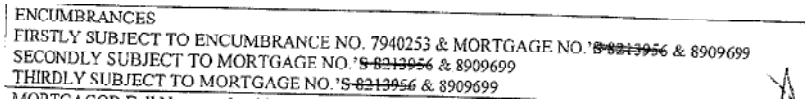
Assigned Security means the following :

- real property mortgage no. 7752654 granted to the Assignor by the Chargor over Certificate of Title Volume 5132 Folio 961.

k. The deceit of the NAB officers continued during the finalisation of the security documents required under the 1st AGFT Bill Facility from the date of execution by the registered proprietors, the date of lodgement with the LTO and from the date of the return from registration of the first raft of security documents from the LTO; NAB officers knowingly sought to register and conceal the fatal flaws in the documents from both the LTO and the Registered Proprietors being the Mortgagees.

l. Prior to the lodging for registration of the 1st NAB Mortgage with the LTO on the 28th June 2002 (***subsequent to the execution of that Mortgage by the Registered Proprietors on the 21st June 2002)*** it appears that officers of the NAB endeavoured to conceal flaws in the mortgage and made hand amendments to the face of the Mortgage without the knowledge or consent of the Registered Proprietors of SP or the Trustees of AGFT

m. The 1st, 2nd & 3rd amendments made were the deletion of the numbers "8213956" referring to the BankSA Mortgage (the 1st Registered Mortgage) on page 1 of 4 in the paragraph entitled encumbrances


ENCUMBRANCES
FIRSTLY SUBJECT TO ENCUMBRANCE NO. 7940253 & MORTGAGE NO. ~~8213956~~ & 8909699
SECONDLY SUBJECT TO MORTGAGE NO. ~~8213956~~ & 8909699
THIRDLY SUBJECT TO MORTGAGE NO. ~~8213956~~ & 8909699

n. The 4th & 5th amendments were made at paragraph 2(b) also on page 1 of 4

(b) Notwithstanding any other provisions of this Mortgage it shall be security only for the payment to the Mortgagee of the moneys which are purported to be secured by

Memorandum of ~~DISCHARGED~~ MORTGAGE NO. 7752654 DATED 30/06/1994 GIVEN BY ANDREW MORTON GARRETT & AVERIL GAY GARRETT FOR, WHICH THIS DOCUMENT IS GIVEN IN SUBSTITUTION → CTRBV 5132/961

i.

o. Those amendments appear to attempt to remedy a statement that Mortgage 7752654 was in fact discharged as well as state that the 1st NAB Mortgage was given in substitution for Mortgage 7752654 **(The Arranmore Mortgage).**

p. I can only imagine that whoever made the amendment was seeking to create the impression to whomever viewed the document that the Arranmore Mortgage was not discharged and still held an interest in Land; this is very clearly **NOT** the case.

q. It appears that at some later time NAB staff or in the alternative JWS made a further 6th hand amendment to the face of the document encircling the words *"No 7752654 dated 30/06/1994"* and noting that this mortgage applied to Certificate of Title Register Book Volume 5132/961 again referring to the Arranmore Mortgage. This amendment probably would have been made during the stage when JWS (NAB Lawyers) provided its initial advice to NAB prior to appointment of Receivers and managers to the Sunburst /Braidwood Group of companies.

r. This notation does not appear on the LTO Copy of the Mortgage and therefore must have been affixed after registration with the LTO.

s. Within the circle (that appears to be affixed by JWS) a heavy black line appears that has no apparent purpose and that should not have been on the document at the time of lodgement with the LTO.....this line suggests a subsequent unknown amendment.

t. Of great concern is that the 1st NAB mortgage has 6 amendments that were clearly initialled by only one of the parties to the document.

u. That party was not either of the registered proprietors/mortgagors; the initial could only have been an officer of the NAB or in the alternative an officer of the LTO

v. This document was apparently allowed to be processed through the LTO by the LTO and registered without acknowledgment of hand amendments by all parties to the document .....specifically the Registered Proprietors.

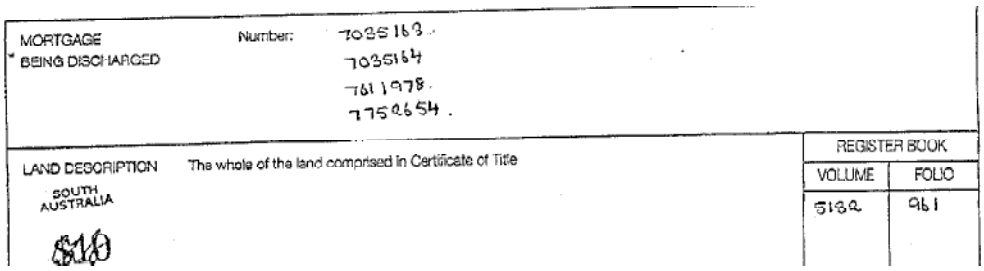
w. Of greatest relevance is the amendment to the operative clause which I am assured by Dean Watson of the LTO during a discussion on the 16th April 2010 would never have been amended by the LTO, consequently the only party who would have made the amendment was the NAB.

x. In a normal circumstance the procedure of the LTO would be to send the document back for correction before registration with acknowledgment of amendments by all parties to the Deed.

y. A requisition notice for correction was raised by the examiner Bernard Sayer on the 16th July 2002 but only in so far as correction to the capacity of the first Mortgagor. This amendment to capacity of the First Mortgagor was made by the conveyancor, SJ Fisher acting on behalf of NAB.

z. It is apparently acknowledged by NAB at this amendment that this mortgage was given only in respect of moneys purported to be secured by the Arranmore Mortgage.....however; The Arranmore Mortgage was fully discharged and secured no money.

aa. The Arranmore mortgage was fully discharged 6 years earlier on the 23rd July 1996 when SP was originally purchased by the registered proprietors and the property known as Arranmore was sold by Andrew & Averil Garrett. The face of the registered discharge of the Arranmore Mortgage shows that a total of 4 Bank SA mortgages were discharged concurrently as follows;



MORTGAGE BEING DISCHARGED Number: 7035163 7035164 761978 7752654

LAND DESCRIPTION The whole of the land comprised in Certificate of Title SOUTH AUSTRALIA

REGISTER BOOK: VOLUME 5132 FOLIO 961

bb. It is extremely relevant that a hand written discharge of the Arranmore Mortgage was prepared and stamped by NAB officers on the 28th June 2002

MORTGAGE BEING DISCHARGED
7752654

COMMISSIONER OF STATE TAXATION - [illegible]
SA STAMP DUTY PAID $10.00
ORIGINAL WITH 0 Copies
DISCHARGE OF MORTGAGE
THE WHOLE OF THE LAND COMPRISED IN CERTIFICATE OF TITLE
AUTH: NAB 6889 47 28/06/2002

CERTIFICATE/S OF TITLE AFFECTED
THE WHOLE OF THE LAND COMPRISED IN CERTIFICATE OF TITLE REGISTER BOOK VOLUME 5132 FOLIO 961

State if WHOLE or PART of land in mortgage is being discharged	State if WHOLE or PART of money secured is being discharged
WHOLE/~~PART~~	WHOLE/~~PART/NIL~~

CONSIDERATION (Words and figures)
SECURITY IN SUBSTITUTION

cc. It is impossible to discern how NAB could seek to discharge a mortgage that was already discharged; In fact this document could have only been prepared for internal NAB purposes and is consistent with the amendment set out in paragraph n & o above. Furthermore the handwriting is also consistent and appears to be the writing belonging to the person who prepared the document being the NAB Attorney; Sally Jane Potter.

NATIONAL AUSTRALIA BANK LIMITED
ABN 12 004 044 937 By its Attorney
SALLY JANE POTTER
22 KING WILLIAM ST ADELAIDE
MANAGER

P/A No. 7075481

dd. This discharge was amended with a hand note by Ms Potter "Do Not Register" as follows;

DISCHARGE OF MORTGAGE

FORM APPROVED BY THE REGISTRAR-GENERAL

BELOW THIS LINE FOR AGENT USE ONLY

CERTIFIED CORRECT FOR THE PURPOSES OF THE REAL PROPERTY ACT 1886

DO NOT REGISTER

Solicitor/Registered Conveyancer

AGENT CODE

Lodged by:

Correction to: NATIONAL AUSTRALIA BANK LIMITED **NATB**

ee. It would appear from this note that Ms Potter realised on the 28th June 2002 that NAB had taken a transfer of a discharged mortgage and it was not possible to lodge with LTO a discharge document in respect of security that was already discharged. Consequently the NAB Officer realised that the Arranmore mortgage and its assignment did not convey an interest in SP in any way which was in fact the reverse of what was described at paragraph g above.

ff. All NAB officers involved in this process must have realised at this time that as a function of limiting the 1st NAB Mortgage to the amount of money purported to be secured by the Arranmore Mortgage (which was fully discharged) that the 1st NAB Mortgage secured no money as that mortgage secured no money and had not in fact secured any money for 6 years.

gg. It appears that what NAB officers had intended was that the BankSA Mortgage should have been assigned by BankSA to NAB and not the Arranmore Mortgage. This is reflected by the Deed of Priority that was prepared between NAB and NMR which set out the NAB security as follows;

Item 1 (Date)	Dated this 21st day of June 2002
Item 2 (Secured Lender)	N M ROTHSCHILD & SONS (AUSTRALIA) LIMITED ABN 32 008 458 366 of Level 21, 120 Collins Street, Melbourne VICTORIA 3000
Item 3 (Mortgagor)	Firstly: ANDREW GARRETT WINE RESORTS PTY LTD A.C.N. 064 792 221 in its own right and as trustee for THE SPRINGWOOD PARK UNIT TRUST of BDO Chartered Accountants 248 Flinders St ADELAIDE SA 5000 and AVERIL GAY GARRETT of PO Box 203 GLEN OSMOND SA 5064
Item 4 (Bank's Security)	Memorandum of Mortgage Registered No. 8213956 dated 29 November 1996 from ANDREW GARRETT WINE RESORTS PTY LTD and AVERIL GAY GARRETT over the whole of the land comprised in Certificate of Title Register Book Volume 5324 Folio 475 and Volume 5344 Folio 326 and Volume 5348 Folio 15.
Item 5 (First Priority Amount)	One Million Five Hundred Thousand Dollars ($1,500,000-00)
Item 6 (Secured Lender's Security)	Memorandum of Mortgage Registered No. 8909699 dated 9May 2000 from ANDREW GARRETT WINE RESORTS PTY LTD and AVERIL GAY GARRETT over the whole of the land comprised in Certificate of Title Register Book Volume 5324 Folio 475 and Volume 5344 Folio 326 and Volume 5348 Folio 15.

hh. Had the NAB officers in fact amended the 1st NAB Mortgage to refer to the BankSA mortgage rather than the Arranmore Mortgage then the limit of security offered by the 1st NAB mortgage would have been the money owed to BankSA at the time of the taking of the mortgage being $344,000 but instead the amount secured by the 1st NAB Mortgage was NO MONEY whatsoever.

ii. It follows that the 1st NAB Mortgage (No 9374752) was ineffective to provide any security in respect of the $1,500,000 advance made under the 1st AGFT Bill Facility Letter of Offer as the mortgage was specifically limited by agreement between Mortgagee and Mortgagor.

jj. NAB officers realised as early as 28th June 2002 that the 1st NAB mortgage in fact secured NO MONEY whatsoever.

kk. Additionally the Deed of Priority executed between NMR and NAB was ineffective to rank the 1st NAB Mortgage in front of the NMR Mortgage in any way.

ll. The only mortgage that was entitled to such ranking was the BankSA mortgage as expressed in the Deed of Priority ,

mm. As set out above this mortgage was never assigned or transferred to NAB by BankSA and was fully and unconditionally discharged on the 28th June 2002;

DISCHARGE OF MORTGAGE

MORTGAGE BEING DISCHARGED	8213956
CERTIFICATE(S) OF TITLE AFFECTED	The whole of the land comprised in Certificates of Title Register Book Volume 5324 Folio 475, Volume 5344 Folio 326 and Volume 5348 Folio 15

NMR Mortgage

8. On the 24th December 2002 International Vintners Australia **(IVA)** sold a property in the Yarra Valley. The proceeds of this sale were used to for the sole purpose of reducing indebtedness of IVA to NMR by $940,000.
A condition of the debt reduction was the discharge of the Garrett related securities including the Guarantees and the NMR mortgage **(the NMR securities)** to enable AGFT to procure additional funding to invest in IVA.

Concurrent with the discharge of the NMR securities a Deed of Amendment and Release was executed which set out the following detail;

This Deed of Release and Amendment

is made on 2002 by:

1. **International Vintners Pty Ltd**
   ABN 18 060 306 765
   of 11 Birralee Road, Regency Park, South Australia 5010
   (Vintners)

2. **N M Rothschild & Sons (Australia) Limited**
   ABN 32 008 458 366
   of Level 15, 1 O'Connell Street, Sydney, New South Wales, 2000
   (Rothschild)

3. **Each party listed in the Schedule**
   (Other Guarantors)

Recitals

A. Andrew Garrett Wine Resorts Pty Ltd ACN 064 792 221 on its own account and as trustee of the Springwood Park Unit Trust (AGWR), Andrew Morton Garrett in his personal capacity and as trustee of The Andrew Garrett Family Trust (AMG) and Averil Gay Garrett as trustee of The Andrew Garrett Family Trust (AGG) are Guarantors under a Loan Facility Agreement dated 28 September 2001 between Vintners, Rothschild, AGWR, AMG, AGG and the Other Guarantors (as amended by the Amending Agreement dated 18 January 2002 between Vintners, Rothschild, AGWR, AMG, AGG and the Other Guarantors) (Agreement).

B. This deed releases AGWR, AMG and AGG from their obligations, rights and liabilities as Guarantors under the Agreement.

C. The parties to this deed wish to amend the Agreement in the manner set out below.

The Deed of Amendment and release confirmed that the NMR Mortgage was a security in support of a Guarantee of a third party debt (IVA) given by AGFT et al and set out the request an acknowledgment;

2 Request and acknowledgment

Vintners and the Other Guarantors:

(a) request Rothschild to release AGWR, AMG and AGG from all liability as Guarantors under the Agreement;

(b) request Rothschild to discharge mortgage number 8909699 over Springwood Park;

NAB was not a party to the Deed nor did it have an equitable interest in the discharge of NMR securities as it did not provide any money.

As a consequence of execution of the Deed a copy of a memorandum of discharge of the NMR mortgage was provided to Edward Shipley of IVA.

Concurrently, the original Duplicate certificates of Title of SP should have been provided to the Registered Proprietors by NMR

However, on the date of lodgement of the discharge of the BankSA Mortgage the duplicate certificates of title were also lodged by BankSA

TITLES, CROWN LEASES, DECLARATIONS ETC. LODGED WITH
INSTRUMENT (TO BE FILLED IN BY PERSON LODGING)

1. C/T 5324/475
2. C/T 5344/326
3. C/T 5348/15
4. R/M 8213956

The discharge document prepared by Bank SA was silent as the delivery of the duplicate CTs in the delivery panel subsequent to the preparation by BankSA it appears that an NAB officer had filled in the rear panel in a manner reflecting that NAB was to receive delivery of the duplicate CTs on discharge presumably as a consequence of the purported assignment of the BankSA mortgage which in fact did not occur .

DELIVERY INSTRUCTIONS (Agent to complete)
PLEASE DELIVER THE FOLLOWING ITEM(S) TO THE UNDERMENTIONED AGENT(S)

ITEM(S)	AGENT CODE
5 x C1	NATB 58

It appears that NAB had held the duplicate CTs from the date of discharge of the BankSA mortgage without the knowledge or consent of the registered proprietors or of the then 1st Registered Mortgagee being NMR.

In a normal circumstance the original Duplicate Certificates of Titles of SP should have been in the hands of NMR(pursuant to the NMR Mortgage being registered 1st on the titles) upon the discharge of the Bank SA Mortgage **and not** in the hands of NAB as appears to be the case from the date of the discharge of the BankSA Mortgage registered on the 24th July 2002.

Subrogation of the NMR Mortgage and Equitable Mortgage established.

Upon the receipt of the discharge of the NMR mortgage, it was not possible nor was it my intention to discharge the NMR Mortgage as the original Duplicate Mortgage and the duplicate CTs were not provided to me (in any of my capacities) at this time.

I had not decided to register the NMR mortgage discharge in any of my capacities; personally, as joint trustee of AGFT or sole director of Andrew Garrett Wine Resorts **(AGWR)** in its capacity as Trustee of the Springwood Park Unit Trust **(SPUT)** as the purpose of the discharge of the NMR mortgage was to provide additional funding to IVA.

On 24th December 2004 the NMR Mortgage was subrogated to AGFT and continued to be beneficially held by AGFT from then on. As a consequence the Duplicate Certificates of Title of SP should have been delivered to the possession of AGFT by NMR resulting in the establishment of an equitable mortgage. NAB held no rights to possession of the Duplicate CT's of Springwood Park in spite of the 1st NAB Mortgage(2nd Registered Mortgage) being registered on the property as the mortgage secured no money.

The NMR mortgage (subrogated to AGFT) continued to be registered on the title until the order of the court to discharge the 1st Registered Mortgage. At the time of making of the order the Honourable Gray J fell into error in failing to provide proper support to an unrepresented party. The learned Judge failed to question the motives of NAB in executing a second mortgage 1 month prior to the appointment of Receivers and managers to the Sunburst Braidwood Group of companies.

On the 4th of November 2003 I wrote to NMR seeking the provision of the original duplicate NMR Mortgage. I was advised by NMR that NMR had never held the duplicate CTs

The original Duplicate NMR Mortgage was provided to me on the 11th November 2003 under cover of letter from Freehills Melbourne Office.

In accordance with the principals of subrogation the equitable interests of the NMR Mortgage were transferred to the parties providing the surety on behalf of IVA namely the AGFT and The Mortgagor.

The 2nd NAB Mortgage

9. A second mortgage was taken by NAB on the 29th May 2003 and subsequently presented to the LTO for registration on the 20th June 2003 and registered on the 5th of July 2003. On registration this mortgage was given Mortgage No 96717285 (the 2nd NAB Mortgage) which became the third registered Mortgage on the title.

   This mortgage was not provided as security to any advance as no advance was made and no Bill Facility Letter of Offer was executed. Of interest the stamping of the face of the document suggests that the Mortgage is security for $522,000...which was never advanced;