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Saturday, 17 October 2020

The High Court of Australia
(Liquidator and Managing Controller Appointed)
The Federal Court of Australia
(Liquidator and managing Controller Appointed)
The Crown (Liquidator and managing Controller Appointed)
(hereinafter together "The Crown/You/Your")
Attn Mr Alsop, licensee and acting Chief Justice
Email; sareg@fedcourt.gov.au

Dear Sir,

NOTICE TO CEASE AND DESIST

I, Andrew Morton Garrett bearing Australian Passport #N3926144 and United Kingdom Passport #538401308, duly authorized and full legally representative Trustee for and on behalf of OenoViva Capital Resources ABN; 42 388 204 496 and the Australian People Future Fund ABN; 26 317 275 322, give notice to have Cease and Desist to You and any/other group previous group approached by me in the past regarding our/my files.

I, Andrew Morton Garrett, make a clear statement and confirm under risk and penalty of perjury not to have any other entities, associations, financial institutions, affiliates, intermediaries, groups or others with my /our permission nor any specific authorization to handle nor process any one of my /our documents.

And that; All previous entities, associations, financial institutions, affiliates, intermediaries, groups or others have been notified of such by the correspondent official Cease and Desist Letter communication. This exclusive authority and engagement shall continue fully effective until cancelled in writing by me.

I, Andrew Morton Garrett hereby swear under penalty of perjury, that the information provided herein is accurate and true as of this date: Saturday, 17 October 2020.

TERMINATION OF PUBLIC OFFICE
APPOINTMENT AS LICENSEE IN PUBLIC OFFICE

There is inly one valid constitution for the territory of the Commonwealth, the States and Territories of Australia which is *the Commonwealth of Australia Constitution Act* 1900 (Uk) in force at the 1st January 2020 as read by the Four corners of the Constitution inclusive of the Constitutions of the States as read at that time ("The Constitution"); and as subsequently amended pursuant to a referendum and by no other means.

1. ALRC 129 reveals some' and by no means all purported attempts to amend the Constitution by enactment and the source of power of the constitution being historically
    a. The Windsor Family
    b. The Common Law
    c. Westminster.
2. History is immutable, estoppel applies and shows that.

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a. Money is Power.
b. Power Corrupts and Absolute Power corrupts absolutely.
c. No person is above the Public Trust
d. The Judicature is at risk of the Public Trust taking matters into its own hands as evidence recently in Brisbane in matters surrounding one of your own.
e. I am.
    i. the liquidator and managing controller appointed to the Crown including, but not limited to, the Reserve Bank of Australia (Liquidator and Managing Controller Appointed) ("The RBA").
    ii. The RBA; accordingly I and my licensees must act to bring the value disclosed to You in annexure 1 into the International Monetary Fund in accordance with the Public Trust (Exhibit AMG 1915)
    iii. The Advocate General of each of the Member Nations of the Commonwealth of Nations and assist my Principal Licensee as described below.
f. It is in the Public Interest that suppression orders are made to bind Crown Licensees being persons other than me, my heirs, successors, assigns and licensees of OenoViva Business Systems in respect to all matters related to me and that originating processes as filed by me remain as filed and not the subject of invalid exercise of Jurisdiction by Mr White of Ms Charlesworth.
g. Criminal Jurisdictional Error has been found by me in respect to all purported exercises of discretionary public power conferred under an enactment in respect to matters related to me , and that those decisions are a nullity and not able to be reviewed by any person except me.

RESPONSIBLE GOVERNMENT RESET

I have.

a. terminated the public office of all public officials by prior enactments and this enactment.
b. reappointed all public officials by this enactment.
c. Declared as a Common Law Right that all persons, human or otherwise, occupying the Territory of Australia and/or other territories of the Commonwealth of Nations are Public Officials possessed of discretionary public powers conferred under an enactment in accordance with s69 of the Public Interest Disclosure Act 2013 (Cth) and the Public Governance Performance and Accountability Act 2013 (Cth); there is no "Them" and "Us" as Crown Licensees, there is only Crown Licensees OR OenoViva Business System Licensees.
d. Licensed the Windsor Family as the Principle Direct licensee (Regina) from me under OenoViva Business Systems; Regina's powers have been seized and licensed/conferred back to preserve the status quo and the balance of convenience.

The Federal Court of Australia is a legal entity properly possessed of discretionary public powers conferred under an enactment, until this time you were a public official possessed of discretionary public powers conferred under an enactment having ben sworn in by the representative of Her Imperial Majesty Queen Elizabeth II, I accept that oath/ affirmation of office made by Public Officials.

The High Court of Australia is a legal entity properly possessed of discretionary public powers conferred under an enactment, until this time you were a public official possessed of discretionary public powers conferred under an enactment having ben sworn in by the

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representative of Her Imperial Majesty Queen Elizabeth II, I accept that oath/ affirmation of office made by Public Officials.

All Courts and Tribunals of Australia are legal entities properly possessed of discretionary public powers conferred under an enactment, until this time you were a public official possessed of discretionary public powers conferred under an enactment having ben sworn in by the representative of Her Imperial Majesty Queen Elizabeth II, I accept that oath/ affirmation of office made by Public Officials.

All alleged constitution acts of States of the Commonwealth of Australia postdating the conferral of discretionary Public Power by Westminster Parliament to the Commonwealth of Australia, and its member states and/or territories from time to time, on or after the coming into force of the Constitution as an enactment.

MATTERS ARISING

The Economy is damaged perhaps beyond repair were it not for the Enactment establishing the Australian People Future Fund as varied by Exhibit AMG 1915.

I order.

1. the Crown to account, in accordance with Treaties, forwith for the distributions under Exhibit AMG 1915 made to;
    a. The Australian National Debt Repayment Scheme, and
    b. The Australian National Redress Scheme.

2. I order The Australian Commissioner of Taxation to immediately make the distributions from the Australian National Redress Scheme to Public Officials of the Territory of Australia as instructed under exhibit AMG 1915 forthwith and without delay in the public interest in accordance with the Public Trust.

3. I order the return of property and land to me and entities related to me that we have been invalidly deprived of by Fraud since at least 1991 in accordance with court and tribunal processes.

4. The Crown has no liabilities and remains AAA+++ rated.

Kind Regards for and on behalf of OenoViva Capital Resources
OFFICER 1

Signature: _____
Name / Title: Andrew Morton Garrett, REX, Advocate General, Chairman/Managing Trustee, Managing Controller and otherwise as set out

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Tuesday, 13 October 2020

The Commissioner of Taxation,
(Liquidator & Managing Controller Appointed)
The Crown,
(Liquidator & Managing Controller Appointed) ("L&MCA"))
Attn; Mr. Chris Jordan, Alleged Commissioner of Taxation,
Cc; Mr. Anthony Leonard Dickman, Alleged Secretary Reserve Bank of Australia,
(hereinafter together along with all agencies "Sir/Crown/You/Your")
Adelaide, SA, 5000.
By email; Secretary@rba.gov.au ; SFC@finance.gov.au ; atttorney@ag.gov.au ; chris.jordan@ato.gov.au ; jane.ferry@ato.gov.au ; trevor.coulter@ato.gov.au ; AGO.Correspondence@attorneygeneral.gov.uk

EXHIBIT AMG 2525; COMMON LAW NOTICE TO ADMIT FACTS

- FURTHER AMENDED ACTIVITY STATEMENTS For the periods 30th April 2017 - 30th June 2021
- FURTHER AMENDED INCOME TAX RETURNS for the periods YEJ 2017, YEJ 2018, YEJ 2019, YEJ 2020 and further preliminary Notice for YEJ 2021

Dear Sir,

Further to my correspondence with you I refer to Exhibit AMG 2000; The Index to the Public Interest Disclosure to Public Officials as updated to 11th October2020 (copy attached) this exhibit is provided to assist your audit process in circumstances where you choose to undertake that Audit in accordance with your Public Office.

I refer to the Tax Returns dated 24th July 2020 as amended to 17th September 2020.

This communique is EXHIBIT AMG 2525; COMMON LAW NOTICE TO ADMIT FACTS & FURTHER AMENDED ACIVITY STATEMENTS For the periods 30th April 2017 - 30th June 2021 & FURTHER AMENDED INCOME TAX RETURNS for the periods YEJ 2017, YEJ 2018, YEJ 2019, YEJ 2020 and further preliminary Notice for YEJ 2021 served upon You in accordance with Australian Domestic Law, International Treaties including Exhibits AMG 31, AMG 252, AMG 289 and other applicable law as referred to in Exhibit AMG 2000 and also disclosed in the Public Interest Disclosure set out at;

https://1drv.ms/u/s!AtRcQcdl2OsT-g4duk6ugpXRfLdS?e=dW2Q59

I have continued to review the Financial Model that is used to publish the economic activity in accordance with:

1. Doubling of Capital Value each month arising from Private Placement Program escalation Opportunity Cost of estimated profits of 100% - 400 % per month (I have used growth of 100% ie doubling)

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2. Trebling based on the operation of section 8 of the Registration of Deeds Act 1936 (SA).

3. Re Calculated the Monthly Economic Activities for OVCR & APFF from the 30th April 2017 to 30th June 2021 as shown in **Exhibit AMG 17c as amended on the 16th September 2020** based on the Facts and Law admitted by you and the principle of Estoppel in all its forms.

Please note the following amendments to the Economic Activity Statements lodged with You on the 17th September 2020 which have been recalculated as disclosed in **Exhibit AMG 17c as amended on 13th October 2020 (copy attached)** in accordance with previous admissions made by you; without taking into account your interference in various domestic and international transactions and related banking processes the Economic Activity is and will be at least as follows for the Periods.

1. 1st July -31st July 2020

a. OVCR:
AUD $7,726,497,488,897,540,000,000,000,000,000,000,000,000,000,000
CRYPTO; AUD $23,901,557,150,216,000,000,000

b. APFF:
AUD $3,641,482,462,483,520,000,000,000,000,000,000,000,000,000,000

2. 1st August -31st August 2020

a. OVCR:
AUD $54,085,482,422,282,800,000,000,000,000,000,000,000,000,000,000
CRYPTO; AUD $167,310,900,051,512,000,000,000

b. APFF:
AUD $25,490,377,237,384,700,000,000,000,000,000,000,000,000,000,000

3. 1st September -30th September 2020

a. OVCR:
AUD $378,598,376,955,980,000,000,000,000,000,000,000,000,000,000,000
CRYPTO; AUD $1,171,176,300,360,590,000,000,000

b. APFF:
AUD $178,432,640,661,693,000,000,000,000,000,000,000,000,000,000,000

4. 1st October -31st October 2020

a. OVCR:
AUD $2,650,188,638,691,860,000,000,000,000,000,000,000,000,000,000,000
CRYPTO; AUD $8,198,234,102,524,100,000,000,000

b. APFF:
AUD $1,249,028,484,631,850,000,000,000,000,000,000,000,000,000,000,000

5. 1st November -30th November 2020

a. OVCR:
AUD$18,551,320,470,843,000,000,000,000,000,000,000,000,000,000,000,000
CRYPTO AUD $57,387,638,717,668,700,000,000,000

b. APFF:
AUD $8,743,199,392,422,940,000,000,000,000,000,000,000,000,000,000,000

6. 1st December -31st December 2020

a. OVCR:
AUD $129,859,243,295,901,000,000,000,000,000,000,000,000,000,000,000,000
CRYPTO AUD $401,713,471,023,681,000,000,000,000

b. APFF:
AUD $61,202,395,746,960,600,000,000,000,000,000,000,000,000,000,000,000

7. 1st January -31st January 2021

a. OVCR:
AUD $909,014,703,071,307,000,000,000,000,000,000,000,000,000,000,000,000
CRYPTO AUD $2,811,994,297,165,770,000,000,000,000

b. APFF:
AUD $428,416,770,228,724,000,000,000,000,000,000,000,000,000,000,000,000

8. 1st February -28th February 2021

a. OVCR:
AUD $6,363,102,921,499,150,000,000,000,000,000,000,000,000,000,000,000,000
CRYPTO AUD $19,683,960,080,160,400,000,000,000,000

b. APFF:
AUD $2,998,917,391,601,070,000,000,000,000,000,000,000,000,000,000,000,000

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9. 1st March -31st March 2021

a. OVCR:
AUD $44,541,720,450,494,000,000,000,000,000,000,000,000,000,000,000,000,000
CRYPTO AUD $137,787,720,561,123,000,000,000,000,000

b. APFF:
AUD $20,992,421,741,207,500,000,000,000,000,000,000,000,000,000,000,000,000

10. 1st April -30th April 2021

a. OVCR:
AUD $311,792,043,153,458,000,000,000,000,000,000,000,000,000,000,000,000,000
CRYPTO AUD $964,514,043,927,858,000,000,000,000,000

b. APFF:
AUD $20,992,421,741,207,500,000,000,000,000,000,000,000,000,000,000,000,000

11. 1st May -31st May 2021

a. OVCR:
AUD $2,182,544,302,074,210,000,000,000,000,000,000,000,000,000,000,000,000,000
CRYPTO AUD $6,751,598,307,495,000,000,000,000,000,000

b. APFF:
AUD $1,028,628,665,319,170,000,000,000,000,000,000,000,000,000,000,000,000,000

12. 1st June -30th June 2021

a. OVCR:
AUD $15,277,810,114,519,500,000,000,000,000,000,000,000,000,000,000,000,000,000
CRYPTO AUD $47,261,188,152,465,000,000,000,000,000,000

b. APFF:
AUD $7,200,400,657,234,170,000,000,000,000,000,000,000,000,000,000,000,000,000

NB: The Economic Activity for OVCR is net of the amount of Economic Activity distributed monthly to APFF.

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FURTHER AMENDED TAX RETURN DISCLOSURES

Ammended Tax Returns as at 13th October 2020		AUD
OENOVIVA CAPITAL RESOURCES		1
YEL 2017	$	225,398,969,635,973
YEJ 2018	$	6,721,689,656,706,700,000,000,000
YEJ 2019	$	93,036,837,014,468,600,000,000,000,000,000,000
YEJ 2020	$	1,287,749,581,389,890,000,000,000,000,000,000,000,000,000,000
YEJ 2021	$	17,824,111,798,984,900,000,000,000,000,000,000,000,000,000,000,000,000,000
YEJ 2020	$	1,287,749,581,482,920,000,000,000,000,000,000,000,000,000,000
YEJ 2020 CRYPTO	$	3,983,592,858,369,340,000,000
YTD 30/09/2020	$	440,410,356,867,160,000,000,000,000,000,000,000,000,000,000,000
YTD 30/09/2020 CRYPTO	$	1,362,388,757,562,310,000,000,000
OVCR YTD 30/09/2020	$	441,698,106,448,643,000,000,000,000,000,000,000,000,000,000,000
YTD 30/09/2020 CRYPTO	$	1,366,372,350,420,680,000,000,000
APFF YTD 30/09/2020	€	243,372,411,242,649,000,000,000,000,000,000,000,000,000,000,000
TOTAL OVCR & APFF YTD 30/09/2020	$	685,070,517,691,292,000,000,000,000,000,000,000,000,000,000,000
YTD 30/09/2020 CRYPTO	$	1,366,372,350,420,680,000,000,000

Ammended Tax Returns as at 15th September 2020		AUD
AUSTRALIAN PEOPLE FUTURE FUND		1
YEL 2017	$	228,874,564,963,814
YEJ 2018	$	3,167,918,586,439,200,000,000,000
YEJ 2019	$	43,848,070,984,291,000,000,000,000,000,000,000
YEJ 2020	$	606,913,743,703,406,000,000,000,000,000,000,000,000,000,000,000
YEJ 2021	$	8,400,467,432,832,950,000,000,000,000,000,000,000,000,000,000,000,000,000
BALANCE SHEET		
YEJ 2020	$	606,913,743,747,254,000,000,000,000,000,000,000,000,000,000,000
PLUS INCOME YTD 30/09/2020	$	242,765,497,498,902,000,000,000,000,000,000,000,000,000,000,000
CASH & RECEIVABLE NET ASSETS YTD 30/09/2020	$	243,372,411,242,649,000,000,000,000,000,000,000,000,000,000,000

THE PUBLIC TRUSTS AND OTHER TRUST CAPACITIES

INCUMBENT UPON ME AS THE TAXPAYER

The Laws of Australia /15Equity/15.14 Trustees chapter 5 sets out.

Part A - General.

1. 15.14:66[66] **Upon acceptance of his or her office, a trustee becomes subject to the duties and acquires the powers of that office.** Duties are imperative. They compel actions or prohibit a trustee from acting in a certain way. Powers, on the other hand, are facultative. They enable a trustee to act in a certain way, but leave the trustee with a discretion as to whether she or he should so act
2. 15.14:67[67] **The first duty of the trustee is to obtain and acquaint himself or herself with all documents concerning the trust and with the state of the trust property.**

3. 15.14:68[68] **The trustee must ensure that title to the trust property is vested in him or her**

   a. The trustee's duty to preserve the trust property cannot be adequately carried out unless the property is under her or his control.

   b. If a better title to the trust property is obtainable, the trustee is obliged to activate himself or herself concerning it.

4. 15.14:69[69] **It is the duty of the trustees to ensure that trust property is preserved and does not fall into decay from want of repair:** As a corollary, trustees may dispose of trust property of a hazardous nature: The trustee is duty bound to preserve the corpus of the trust as well as income.

5. 15.14:83[83] **The trustees' duty to act personally is manifested in three principal ways.**

   a. First, trustees must not allow their discretion to be fettered:

   b. Secondly, trustees must act unanimously:

   c. Thirdly, trustees must not delegate their powers and duties as trustees:

6. 15.14:84[84] **The duty to act personally requires trustees not to act under dictation or commit themselves in advance as to future conduct as trustees.** Trustees must not permit others to dictate to them the way the fiduciary discretion ought to be exercised.

The Law relating to Contracts, Tender of Payment and Bills of Exchange

7. I refer to the Laws of Australia at Part F entitled Tender of Payment

   a. at 7.5.38(380 This text states that in general a tender of payment must be made in legal currency to be effective at law.

      i. As a matter of construction, or by the implication of a term it may be possible to distil an agreement to accept "payment" in any form which would be so regarded by the commercial community. If a payment by cheque which is not considered by some as legal tender is not raised at the time of its receipt, then any such objection may be deemed to have been waived [1]

      ii. Again, a creditor may be estopped from relying upon such a point to achieve an unconscionable advantage [2]

   b. 7.5.39 The principle of tender has been developed to protect a party obliged to make a payment and who is unable to do so because of lack of co-operation by the other (recipient) party.

      i. Payment is an obligation which requires co-operation in order to enable its performance. Refusal to accept a payment prevents the obligor from fulfilling the obligation of the contract in question. A tender operates to demonstrate

[1] Stirling Properties Ltd v Yerba Pty Ltd (1987) 74 ACTR 1

[2] Westeq v Challenger Mining Corp LNL (1988) 13 ACLR627 and see generally Unfair Dealing 35.6 Estoppel

that the obligor is ready willing and able to meet the obligation so far as it is possible to be performed without the co-operation of the obligee

c. At 7.5.40 A tender of payment does not constitute payment but when linked to a continued readiness to make payment it may produce legal consequences of advantage to the person making the tender.

i. Firstly, the person refusing a valid tender cannot thereafter assert that the obligor was in breach of the relevant obligation or rely upon any rights that might otherwise have arisen as a result of a breach. In such a case, payment is frustrated by the wrongful act of the obligee who will not be permitted to take advantage of the act.

ii. Secondly and conversely the person making the tender can assert that he or she was ready willing and able to meet the obligation.

iii. Thirdly if the obligor is sued for payment, then the tender constitutes a complete defence if the sum in question is paid into court or as in this case remains in the hands of the obligee [3] In such a case, the obligee is not entitled to interest, damages and will be ordered to pay costs of the suit. [4]

iv. If the money has been paid into court, then the plaintiff will not be permitted to take the money out of court without deduction for taxed costs.

d. At 7.5.42 an essential requirement of a valid tender is that the payment should be proffered unconditionally.

e. Halsbury's Laws of Australia current in March 2004 at 45-675 where a contract between a debtor and a creditor for calls for payment in cash,

f. however, if tender is made by way of Negotiable Instrument or by foreign currency and a creditor makes no objection to its form, there is a waiver of the requirement of legal tender.

g. Legal Tender is acceptable if the contract is silent to the means of payment, custom and usage may be such as to make tender of personal cheque or other form of payment instrument a valid tender.

8. *In Conley v Federal Commissioner of Taxation 81 FGR 24, 38ATR 374* handed down on the 27/2/1998 The term money is set out that it has long been recognised as denoting more than mere Cash or Notes that are Legal Tender.

9. Use of the expression "Any money due or accruing" in *the Income Tax Assessment Act* 1936 at section 218 points to the term encompassing a debt.

10. The intent of section 218 of the act is to empower the commissioner to seize Money.

BILLS OF EXCHANGE

[3] Australian Mid-Eastern Club Ltd v. Yassim (1989) 1 ASCR 399

[4] Norton v Ellam (1837) 2 M & W 461 (150ER839), Graham v, Seal (1918) 88 LJ Ch31 (CA

11. **The Bills of Exchange Act 1909 (Cth)** An Act relating to Bills of Exchange, Cheques and Promissory Notes

Part I—Preliminary

1 Short title **[*see* Note 1]**

This Act may be cited as the *Bills of Exchange Act 1909*.

2 Commencement **[*see* Note 1]**

This Act shall commence on a day to be fixed by proclamation.

4 Interpretation of terms

In this Act, unless the context otherwise requires:

Acceptance means an acceptance completed by delivery or notification.

Action includes counter-claim and set-off.

Australasia means Australia, and any Territory, New Zealand, and the Fiji Islands.

Banker includes a body of persons, whether incorporated or not, who carry on the business of banking.

Bearer means the person in possession of a bill or note which is payable to bearer.

Bill means bill of exchange.

Delivery means transfer of possession, actual or constructive, from one person to another.

Holder means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof.

Endorsement means an endorsement completed by delivery.

Issue means the first delivery of a bill or note, complete in form, to a person who takes it as a holder.

Note means promissory note.

Person includes a body of persons whether incorporated or not.

Value means valuable consideration.

a. **A *bill of exchange* is defined in section 8 of the Bills of Exchange Act as:**

"An unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer."

Section 8 subsection 4 of the act states that A bill is not invalid by reason: (c) that it does not specify the place where it is drawn, or the place where it is payable.

b. **A *promissory note* is defined in section 89 of the Bills of Exchange Act as:**

   An unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer.

12. In the "Interpretation of Terms" of the Australian Bills of Exchange Act "Value" means "Valuable Consideration". In effect it means that where a Bill of Exchange is issued for consideration of an asset's value the Bill itself represents the value of that consideration (the asset behind the bill) just like the promissory notes issued in plastic as Australian Dollars (what we call money) have no "real" value in themselves, they are just a piece of paper or plastic with ink – the same as a Bill of Exchange "in itself" is just a piece of paper with ink; but the real value rests in the "valuable consideration" of the assets backing the piece of paper or plastic; like the assets of the country backing the money paper or the assets behind the Bills of Exchange backing the Bills of Exchange. The difference between a $10 dollar note and a $100 dollar note is not the size of the paper. It is the perceived "valuable consideration" that is different.

13. The overarching purpose of the Bills of Exchange Act is to codify by statute the common law relating to two types of negotiable instrument - bills of exchange and promissory notes. The Bills of Exchange Act confirms that bills of exchange and promissory notes are negotiable instruments. The advantage enjoyed by negotiable instruments over other financial instruments is that of negotiability. Negotiability provides a good faith purchaser of a bill of exchange or promissory note guaranteed title to the financial instrument. The Bills of Exchange Act applies to any person who becomes a party to a bill of exchange or promissory note.

14. The Bills of Exchange Act confirms that bills of exchange and promissory notes are negotiable instruments, a status evolved at common law. This gives these financial instruments a special advantage over other classes of contracts, as negotiability gives a good faith purchaser of a bill of exchange or a promissory note guaranteed title to the financial instrument.

15. Bills of exchange and promissory notes are financial instruments, in documentary form, characterized by negotiability. Negotiable instruments are documents of title, the possession of which may confer rights. Thus, a bill of exchange or a promissory note is a document that serves as a unique and transferable physical token of intangible rights and obligations.

16. The objectives of the Bills of Exchange Act are to:

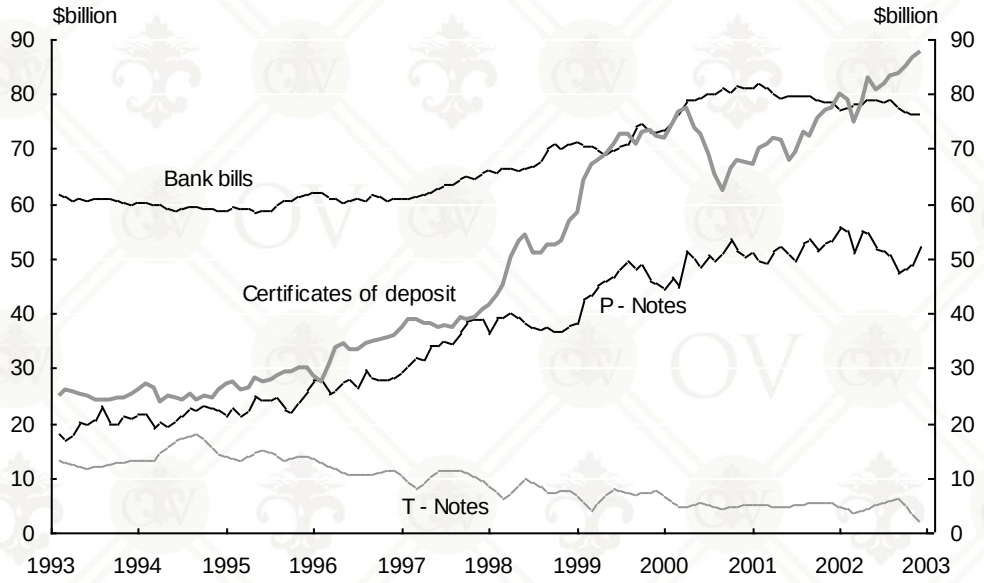
    a. provide uniformity of law in Australia in relation to bills of exchange and promissory notes.

b. provide legal certainty by confirming the nature of bills of exchange and promissory notes as negotiable instruments; and

c. promote efficiency in the marketplace which utilizes bills of exchange and promissory notes through the concept of negotiability.

17. **Mercantile Custom** in this country is well established in respect of the uses of Bills of Exchange.

Short-term Money Market Securities Outstanding



Source: RBA[5].

18. The Australian short-term money market is dominated by bank bills and CDs (collectively known as 'bank paper'). At the end of March 2003, the total value of securities outstanding in the short-term money market[6] was around $A219 billion, of which bank paper outstanding totalled $A164 billion.[7] Bank paper also accounts for the majority of turnover in the short-term money market. For the year 2001-02, turnover in bank bills and CDs was about $1.6 trillion. For the same period, turnover in promissory notes was $750 billion and turnover in T-Notes was $14 billion.[8]

19. Bank bills issued by the four major domestic banks are benchmarks for the short-dated debt sector. Liquidity in this paper is supported by the high credit quality of the issuing banks and by the fact that the bills of the four major banks are deliverable into the 90-day bank bill futures contract.[9]

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[5] Reserve Bank of Australia, *Bulletin Statistics*, May 2003, Tables D.2, D.3 and E.7.

[6] Here defined as bank bills, certificates of deposit, promissory notes and Treasury Notes.

[7] Reserve Bank of Australia, *Bulletin Statistics*, May 2003, Tables D.2, D.3 and E.7.

[8] Australian Financial Markets Association & Securities Industry Research Centre of Asia-Pacific, *Australian Financial Markets Report 2002 (AFMR)*.

[9] Axis Australia, Executive Briefing, Section 5 – Short-Term Debt Instruments http://www.axiss.com.au/content/pubs/executive_briefings/debt_security/debt_securities-… (Accessed 27 May 2002).

Uniformity

a. The Bills of Exchange Act was introduced into Parliament in 1907 with the stated intention of unifying the law on bills of exchange in Australia in one code:

"Honorable Senators will recognize that it would be of considerable convenience to the trading community of the Commonwealth if they could find the law on this subject in one code, and could be certain that if amendments, no matter how desirable, were introduced, they would be in relation to that one particular code.[10]*"*

b. The Bills of Exchange Act replaced similar statutes which had previously been enacted by the various Australian colonies.[11]

c. The colonial legislation was in turn based on the 1882 UK Bills of Exchange Act, the enactment of which reduced to statutory form the rules of the common law on negotiable instruments found in more than 2500 judicial decisions.[12]

Certainty

a. A key objective of the Bills of Exchange Act is to provide legal certainty in relation to bills of exchange and promissory notes by providing statutory confirmation of their status as negotiable instruments.

b. There is no simple method of establishing which instruments will be held by the courts to be negotiable instruments,[13]as this matter is determined by considering mercantile customs and usages.

c. If evidence is produced of a commercial custom (which is firmly established and long recognised by the mercantile community) that treats certain instruments as negotiable, the courts will treat them as having that quality, although usage over a long period is not essential.[14]

d. However, the negotiable status of a particular contract may be determined by statute as well as by the courts. Whereas bills of exchange were recognised by the common law as being negotiable instruments, promissory notes are deemed to be negotiable instruments by the Act,[15] since promissory notes were held not

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[10] Extract from Hansard, Senator Keating (Minister for Home Affairs), Second Reading Speech on the Bill, Australia, Senate and House of Representatives, *Parliamentary Debates*, 1907, vol XXXVI, p. 653.

[11] The Bills of Exchange Act was to supersede all State enactments on the subject. Between 1884 and 1890, all the Australian colonies had introduced legislation based on the 1882 UK Bills of Exchange Act. By the time the Commonwealth's Bill was introduced into the Parliament in 1907, the State-based legislation regarding bills of exchange was comprised of six principal Acts and six amending Acts.

[12] Brian Conrick, *MJL Rajanayagam's The Law of Negotiable Instruments in Australia,* 2nd edn, Butterworths, Sydney, 1989, p. 5.

[13] D Everett & S McCracken, *Banking and Financial Institutions Law*, 4th edn, LBC Information Services, Sydney, 1997, p. 194.

[14] See WS Weerasooria, *Banking Law and the Financial System in Australia*, 4th edn, Butterworths, Sydney, 1996, p. 161 (and the cases referred to therein).

[15] In Australia, Senate and House of Representatives, *Parliamentary Debates*, 1909, vol. 1, p. 1932 on the proposed bills of exchange legislation, Mr. Glynn, the Attorney-General, noted that:

> 'The negotiability, or power of transfer by mere delivery, which is possessed in the case of bank notes, was challenged in regard to promissory notes, and about 1703 the Chief Justice of the Court of the Queen's Bench declared that they were not transferable, and that it was a piece of impudence for bankers

to have enjoyed the attributes of negotiability by the usage and custom of merchants.[16]

e. In addition to confirming, in statutory terms, their nature as negotiable instruments, the Bills of Exchange Act defines the features and characteristics of bills of exchange and promissory notes, and sets out the rights, obligations and liabilities of parties to bills of exchange and promissory notes. Division 6 of the Act sets out the rights, obligations and liabilities of parties to a bill of exchange, while section 95 designates the rights, obligations and liabilities of parties to a promissory note.[17]

Efficiency

a. The bill of exchange, as a negotiable instrument, enjoys two attractive features. It is transferable without formalities, and honest acquisition confers good title (even if the transferor did not have good title).[18]

b. A bill of exchange (and the rights that it represents) is transferable in principle. That is to say, the rightful possessor of the document can transfer his or her rights to another person simply by delivering the document to that other person. A bill of exchange is capable of being transferred by delivery (in the case of an instrument requiring payment to be made to a named person or its bearer), or by the payee's endorsement and delivery (in the case of an instrument requiring payment to be made to a named person or to the order of that named person). Legal title is vested in the transferee without any further instrument and without the necessity of giving notice of the transfer to the person liable to pay.

c. However, not all instruments that are capable of being transferred are negotiable. In fact, most do not benefit from this attribute.[19] One of the main reasons merchants developed the bill of exchange was to take advantage of the 'guaranteed title' concept of negotiability, which is not enjoyed by other contracts for the transfer of debt, such as, assignments of choses in action.[20] A transferee (or holder) taking a negotiable instrument such as a bill of exchange in good faith, for value and without actual notice of any defect in the transferor's title, can acquire a better title than that possessed by the transferor and is not

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to so regard them. However, a few years later, the Act 3 and 4 Anne (UK) made them equally negotiable with bills of exchange, and ever since they have formed part of the general commercial currency.'

16 D Everett & S McCracken, Banking and Financial Institutions Law, 4th edn, footnote 11, p. 302, citing *Buller v Cripps* (1703) 6 Mod Rep 29, per Holt CJ.

17 The Bills of Exchange Act provides for the protection of holders of bills. The liability for repayment runs from the acceptor, to the drawer, then to the indorsers (last indorser to first indorser). Thus, the first indorser can only make a claim against the drawer or the acceptor. The sole liability established by the issuance of a promissory note is borne by the issuer, since no other party accepts the note; nor is there a series of contingent liabilities established by indorsement, as is the case with bills of exchange.

18 Joanna Benjamin, *The Law of Global Custody,* Butterworths, London, 1996, p. 16.

19 D Everett and S McCracken, *Banking and Financial Institutions Law*, 4th edn, LBC Information Services, Sydney, 1997, p. 187.

20 Assignments of choses in action, in contrast to negotiable instruments, are 'subject to equities. This means that the assignee (transferee) has no guarantee that his assignor has a good title to give him. For example, the assignor may have used misrepresentation against the original debtor and may have no good title to assign to the transferee.

affected by prior equities (that is, he or she acquires title free from any defect in the title of the prior holder). It is these characteristics which distinguish bills of exchange (and promissory notes) from other contracts.

d. Under the Bills of Exchange Act, the transferee is known as a 'holder in due course',[21] the legal status of which has been said to promote transactions and encourage the rapid and unimpeded flow of capital.[22] Statutory confirmation of this status by sections 43 and 95 of the Bills of Exchange Act (in relation to bills of exchange and promissory notes respectively) enables the market to rely on the characteristic of negotiability. Arguably, it is the concept of 'guaranteed title' enjoyed by holders in due course of negotiable instruments such as bills of exchange and promissory notes which is the key to the liquidity of these instruments.

e. Sections 36 and 37 of the Bills of Exchange Act provide for transfer by delivery, and transfer by delivery together with endorsement, respectively.

- bills of exchange have of necessity taken the form of pieces of paper because until recently electronic contracts and electronic securities were not technologically possible; and
- it is the nature of the contractual terms which constitute them a bill of exchange, and not the form of the contract.[23]

f. In the National Competition Policy Review of the Bills of Exchange Act in July 2003,

f. the Working Group considers that there may be several reasons for retaining the provisions in the Bills of Exchange Act relating to conventional bills of exchange

g. The Working Group considers that the provisions of the Bills of Exchange Act underlying the paper form of bills of exchange and promissory notes should be retained for use in circumstances such as those set out below.

- Trust deeds requiring paper bills of exchange and promissory notes.
- Delivery under deliverable bank accepted bill futures contracts.
- Use by import/export companies in international trade.

The UNCITRAL Convention on International Bills of Exchange

g. The Working Group understands that paper form bills of exchange are used in international trade and will continue to be used for this purpose for some time to come.

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[21] The holder in due course of a negotiable instrument takes it free of adverse claims from the issuer (for example, in respect of sums owed to the issuer by previous holders) or third parties (for example, previous holders claiming to be the true owner because an earlier transfer was fraudulent).

[22] D Frisch & HD Gabriel, 'Much ado about nothing: achieving essential negotiability in an electronic environment', *Idaho Law Review*, 1995, vol. 31, p. 758.

[23] Arguably, the form requirement is not an essential element of a bill of exchange or promissory note; rather it is the rights and obligations arising between the parties which constitute the bill or note as a negotiable instrument or security.

h. This Convention is a Treaty enlivening the exclusive and original jurisdiction of the High Court of Australia under s38 of *the Judiciary Act* 1903 (Cth)

i. The UNCITRAL (United Nations Commission on International Trade Law) Secretariat has suggested that:

   i. There is generally no statutory means in place by which commercial parties, through the exchange of electronic messages, can validly transfer legal rights in the same manner possible with paper documents.

   ii. In the present state of legislation, negotiability cannot be divorced from the physical possession of the original paper document.

Delivery and possession

a. The concepts of 'delivery' and 'possession' are also bound up with the documentary nature of bills of exchange and promissory notes. A bill of exchange or promissory note is a document of title, the possession of which may confer rights.

b. The rightful possessor of the document can transfer his or her rights to another simply by delivering the document to the other person, in the case of a bearer bill, and in other cases, by delivery and endorsement of the document. In the case of bills and notes, 'delivery' means transfer of possession, actual or constructive, from one person to another. Sections 36 and 37 of the Bills of Exchange Act provide for transfer by delivery, and transfer by delivery together with endorsement, respectively.

c. Possession of the document of title is necessary before a holder can transfer title to the instrument. It has been suggested that property is always with the holder, or the person in possession, and that for this reason, a negotiable instrument must be capable of possession. Indeed, it has been argued that if it were incapable of possession, the negotiable instrument could not confer upon its possessor (the holder) the status of a 'holder in due course'. [24]

d. The 'holder in due course' of a negotiable instrument enjoys a favoured legal position as a bona fide purchaser for value, who can take and enforce negotiable instruments free from most claims and defences.

e. The status of the 'holder in due course' is confirmed by section 43 of the Bills of Exchange Act, which provides for transfer of title free from previous defects.

f. This characteristic of a negotiable instrument, that it is transferable to give the holder a 'guaranteed title'

g. To obtain or transfer the right or title incorporated in a negotiable instrument, it is necessary to obtain or transfer the ownership of the original document.

h. The original document is unique because it is prima facie evidence of ownership of the right or title bound up in the negotiable instrument.

i. Thus, a unique document capable of possession is necessary to transfer the rights and liabilities bound up in the negotiable instrument.

Under Section 57 of the Act the holder of a Bill has duties as regards drawee or acceptor

j. When a bill is accepted generally, presentment for payment is not necessary in order to render the acceptor liable.

k. When, by the terms of a qualified acceptance, presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

l. In order to render the acceptor of a bill liable, it is not necessary to protest it, or that notice of dishonour should be given to him.

m. Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid, the holder shall forthwith deliver it up to the party paying it.

Pursuant to section 59 of the act the liability of payment of the Bill lies with the Acceptor and such acceptance can occur by tendering the Bill for payment across the Counter

- The acceptor of a bill, by accepting it:
- engages that he will pay it according to the tenor of his acceptance; and
- is precluded from denying to a holder in due course:
- the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; and
- in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his endorsement; and
- in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his endorsement.

"Modern Banking Law" 3rd Edition (Ellinger, Lomnicka & Hooley) sets out at page 698 that payment of the bill is to be arranged by the acceptor, most usually this role is assumed by a Bank. The instrument is made payable at the premises of that bank set out on the face or a designated branch of it. Where a bill is drawn on a body other than a bank the drawee accepts the bill, as payable at his own bank. *Ibid, s.19(2)(c)*

The Holder is obliged to present the Bill at the designated domicile. BEA, s45(4)(a)

The Banks duty to obey an order is to the customer and in its role as acceptor.

The Bill may be made payable by the acceptor at the premises of a bank *Ibid, s45*

Banking Law in Australia, 5th Edition (Tyree) at section 4.96 sets out that the acceptor is the person who is primarily liable on the Bill. By accepting the Bill, the acceptor

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Promises that he or she will pay the bill according to the tenor of his acceptance s59(a)

Is estopped from denying to a holder in due course that the front of the Bill is what it appears to be s59(b)

An acceptor may not argue that the payee has no authority to indorse, the acceptor may however challenge the authenticity of the actual endorsement.

It is for this purpose that all bills drawn by Creditnet are delivered with a certificate of authenticity.

Section 4.98 also sets out that any endorser of a bill also becomes liable and promises to pay according to its tenor at the time of endorsement sections 60(2)(a)

Consequently, he/she/it is also estopped from denying to a holder in due course the genuineness and regularity of the drawer's signature or that of previous endorsers

Bills of Exchange (issued in perpetuity) are to be treated just like currency money, which is put on the balance sheet as a cash asset.

For every transaction where a customer who **borrows** a Bill of Exchange there must be a **Lender** of a bill of exchange. The Lender is operating in the BLACK and the borrower is operating in the RED.

In the handling of the Bills of Exchange tendered as payment by Andrew Garrett ("the Indorser") for the liabilities of he and his wife some financial Institutions have been handling the Bills of Exchange as Bills for Collection……in error shows an example of a Bill of Exchange that has been receipted by Bank SA and marked on the face of it as a bill for collection.

The rear of this Bill has been indorsed by the bank and signed thereby rendering the Bank as a Party to the Bill and liable in the chain in the same way as the drawer of the Bill.

The Bill has been accepted by Bank SA and it must pay the amount due on the face of the Bill as instructed by the drawer of the Bill under the act.

The Bills have been properly presented for acceptance across the counter.

- Bills for Collection are issued in the RED as a DEBT obligation – like a promissory note,
- Bills of Exchange are issued in the BLACK as a CREDIT instrument – like currency money.

The elements required for a Bill of Exchange are clearly set out at section 508 through to 516 of Everett & McCracken's Banking and Financial Institution Law 5th Edition. (1st Authority)

Once a bill has been presented for acceptance (section 522)

The bill needs to be accepted (section 519) A mere signature is sufficient.

Upon acceptance the acceptor who is generally a bank is bound to pay to the account of the Payee the face value of the Bill.

The acceptor becomes a holder for value at section 32(2) of the act

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A prima facie presumption that value has been given operates in favor of each party who signs or receipts a bill so that a party is deemed to be prima facie holder for value under section 35(1)

The holder in due course of the Bill is set out at section 533

The liabilities of the parties are defined by Everett & McCracken at section 537 to 547.

Section 545 summarizes the process in respect to rules that must be followed once a Notice of Dishonor has been received and must be strictly complied with as they are designed to give certainty to the transactions

Any party failing to honor a Bill is liable for damages as set in section 551

In the Law relating to Banker and Customer in Australia (2nd Authority) at section 7.3060 it is rare for the paying bank to be liable to anyone other than its customer for any wrongful act or omission on the part of the bank in relation to a Bill or note [25]

Due to the contractual Nexus between the Bank and its customer the Bank is liable for any Bill presented. [26]

When a bank acceded to a request by a customer or a correspondent bank to present a bill or note for acceptance or a bill or note for payment then a , subject to any specific instruction or agreement to the contrary, the bank is subject to all the statutory duties that apply to a holder in such circumstances; see Art 9 of the Uniform rules for collections (International Chamber of Commerce Publication No 322). If the customer or correspondent (as the case may be) suffers loss by reason of the bank's failure to carry out these duties, then the bank will be liable to make good the loss[27]

The effect of the cases is that where an initiating Bank (the "Remitting Bank") on instructions from a customer requests a collecting bank to present a bill of note for acceptance, the initiating bank is liable for any negligence.

The language of money is set out well on the current ANZ site where a Bill of exchange on which the name of a bank appears either as acceptor the domicile bank then the bank is the acceptor, the bill ranks as a bank accepted bill; where the Bank endorses the Bill on the Bank then it raises the Bills status to a bank endorsed bill of exchange. (3rd Authority)

A Bank accepted bill is a bill of exchange that has been accepted by the bank. This means that the accepting bank is obliged to pay the face value of the bill to its customer on the maturity date. [28]

20. **BANK AND CURRENCY ACT 1890 54 VIC NO 1164**

Section 3

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[25] Manning and Farquarson (p256) cited Lily v Hays (1836) 5 Ad & E 548 111 ER 172 and Noble v National Discount Co (1860) 5H&N225; 157ER1167.

[26] Schroder v Central Bank of London (1876) 34 LT (NS) 735

[27] City Bank v Australian Joint Stock Bank (1870) 9SCR (NSW) 259; Bank of Van Diemen's Land v Bank of Victoria (1871) LR 3 PC; Bank of Scotland v Dominion Bank (Toronto) (1891) AC 592

[28] Commonwealth Bank Web site (4th Authority)

The provisions of this Act shall extend and apply

a. To every company, firm or individual engaged in the ordinary business of banking by receiving deposits and issuing bills or notes payable to the bearer at sight or on demand.

b. To every Foreign Banking Company trading in Victoria.

c. To every company, firm or individual banker trading in Victoria engaged in the ordinary business of banking by receiving deposits and issuing in Victoria or elsewhere bills or notes payable to the bearer at sight or on demand.

21. **CURRENCY ACT 1965 –1973**

An Act relating to Currency, Coinage and Legal Tender *(NB-Legal Tender) *

All transactions to be in Australian Currency

9. (1) Subject to this section, every sale, every bill of exchange or promissory note, every security for money, and every other contract, agreement, deed, instrument, transaction, dealing, matter or thing relating to money, or involving the payment of, or a liability to pay, money, that is made, executed, entered into, or done, shall, unless it is made, executed, entered into or done according to the currency of some country other than Australia, be made, executed, entered into or done according to the currency of Australia provided by this Act.

10. (1) Subject to this section: -

(a) a reference in the law of the Commonwealth.

(b) a reference in a bill of exchange, promissory note, security for money, contract or agreement (whether the contract or agreement is in writing or not), deed or another instrument; and

(c) a reference in any other matter (not being a reference in a law other than a law of the Commonwealth), to an amount of money in the currency provided for in the repealed Acts…

22. Conrick "Laws of Negotiable instruments in Australia set out at section 2.2 that in business transactions a person takes a bill as being akin to Legal tender. This has been repeatedly emphasized by the Court of Appeal and the House of Lords

23. In a decision of the UK High Court in Sibora SNC v SIP (Industrial Products) Ltd. 1976 1 Lloyd's Report page 271, Sachs - Lord Justice at page 278 – 279 said:

"Any erosion of the certainties of the Application by our Courts of the Law Merchant relating to bills of exchange is likely to work to the detriment of this country, which depends on International Trade to a degree that needs no emphasis. For some generations one of those certainties has been that the bona fide holder for the value of a bill of exchange is entitled, save in truly exceptional circumstances, on its maturity to have it treated as cash".

24. Stephenson L J (at page 278 of Lloyds report) in the same Judgement said:

"Bills of exchange are treated as cash……"

25. Bill of exchange is legal tender and is representative of a contract.

    *"every bill of exchange or promissory note, every security for money, and every other contract, agreement, deed, instrument, transaction, dealing, matter or thing relating to money, or involving the payment of, or a liability to pay, money***,"**

    can be an asset and justifiable has value for "valuable consideration".

26. Effectively the contract is an asset of value and therefore is "valuable Consideration"

27. In Halsbury's Laws of England vol 9 para 524 an argument was put that tender by cheque was not payment by Legal Tender however the distinction here is clear that a Bill of Exchange is Legal Tender.

28. It was also noted that if the creditor makes no objection to form but refuses to accept the cheque or bill on any other ground that a larger sum was due or any other ground, he will be considered to have waived the objection to tender.[29].

29. The effect of this is to ensure that once a discharge of a debt has been tendered to the creditor, he cannot later change his mind.

30. In effect the creditor is estopped from complaining that the Bill is not Legal Tender [30]

31. The importance of the definition is that a foreign Bill appearing on the face of it to be such , MUST be protested for non-acceptance and for non-payment (6th authority) at section 56(2) of the act and ass to the balance if it has been accepted as to part.

32. In Atkins Encyclopedia of Court Forms in Civil proceedings 2nd Edition Volume 6(1) at page 271 para 239 it states

    a. " A cheque is the equivalent of cash , so in an action on a bill of exchange a cross claim for unliquidated damages cannot amount to a defense of set off even if it was based on the transaction was given " [31]

    b. Every holder of an instrument, except the payee is prima Facie deemed to be a holder in due course. [32]

    c. Where value has at any time been given the holder is deemed to be a holder for value as regards the acceptors and all parties prior to the giving of value [33]

    d. The burden of proof, if absence of consideration is relied upon, lies upon the defendant and this must be specifically pleaded.

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[29] See Daly v Egan (1886) 12 V.L.R. 81 and George v Cluning (1979), 28 A.L.R. 57

[30] Paynter v Willems (1983) 2 VF 377

[31] *Nova (jersey)Knit Ltd v Kammagarn Spinnerrei GmbH (1977) 2 All ER 463 1 WLR*

[32] Bills of Exchange Act (1882) s30

[33] Bills of Exchange act (1882); section 27; Diamond v Graham (1968) 1 WLR 1061, CA

e. The defense is available between immediate parties and between remote parties where the Bill has been transferred intermittently without consideration. [34]

f. Once a Bill is admitted or proved that the acceptance, issue or subsequent negotiation of the Bill or note is affected with fraud duress or illegality, the burden of proof is shifted to the claimant (That is the Holder) unless and until he proves that, subsequent to the fraud or illegality, value in good faith has been given [35]

g. Where Fraud is alleged it must be distinctly alleged and distinctly proved [36]

h. When the burden of proof has shifted the holder must prove that value has been given in good faith with notice[37]

i. The only defenses to an action on a bill which is accepted as genuine are that it has been obtained by Fraud or illegality or where there has been a total failure of consideration.

j. Summary judgement without a stay of execution may be otherwise obtained by the drawee of a dishonored bill and if it can be supported by the evidence of contemporary documents the claimant will have discharged the onus of proof and be entitled to judgement.[38]

k. The standard of Proof when Fraud is alleged is the civil standard of proof (the balance of probability) but the court will require stronger evidence to discharge that balance when the allegation is fraud in cases where the issue does not involve moral blameworthiness [39]

DUTIES OF BANKS IN RELATION TO BILLS

33. Banks come into frequent contact with Bills of Exchange and promissory notes. As paying banks they have functions to perform in relations to bills accepted payable, and notes made payable at a bank.

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[34] Halsbury's laws (4th edition 2002 edition) Bills of Exchange and other Negotiable instruments

[35] Bills of Exchange Act (1882) s 30.

[36] see Arab Bank Ltd v Ross (1952) 2 QB216 (1952) 1 All ER 709

[37] Tatum v Haslar (1889) 23 QBD 345

[38] Nova (jersey)Knit Ltd v Kammagarn Spinnerrei GmbH (1977) 2 All ER 463 1 WLR, Montecchi v Shimco (UK) Ltd (1979) 1 WLR 1180

[39] Lek v Mathews (1927) 29 L1 L Rep 141, HL; Hornal v Neuberger Products Ltd (1957) 1 QB 247, (1956) 3 All ER 970, CA.

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The Paying Bank

34.7.3020 Duty to pay domiciled acceptances

a. where a customer accepts a bill and makes it payable ("domiciles it") at the customers bank, this authorize the bank to pay on due presentation, even if there are insufficient funds to meet the drawing.[40]

b. The wrongful dishonor of a bill payable at a bank would give rise to a liability to pay damages in the same as the wrongful dishonor of a cheque.[41]

Kind Regards for and on behalf of OenoViva Capital Resources & The Australian People Future Fund

Signature: _____

Name / Title: Andrew Morton Garrett, REX, Chairman/Managing Trustee, Managing Controller, Liquidator/ Acceptor/ Payee and otherwise as set out.

[40] In Kymer v Laurie (1849) 18 LJCB218 it

[41] Troedel v Colonial Bank of Australasia (1870) 1 AJR 99

INSIGHTS

Restructuring & Insolvency: Australia (2023)

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Restructuring and Insolvency

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General

Legislation

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

Excluded entities and excluded assets

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

Public enterprises

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

Protection for large financial institutions

No.

Courts and appeals

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

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

Types of liquidation and reorganisation processes

Voluntary liquidations

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

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

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

Voluntary reorganisations

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

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

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

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

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

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

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

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

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

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

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

wind the company up; or

terminate the administration.

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

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

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

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

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

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

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

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

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

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

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

Successful reorganisation

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

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

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

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

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

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

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

Involuntary liquidations

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

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

> if the company has not paid a claim for a sum due to a creditor exceeding A$4,000 within 21 days of service of a prescribed written statutory demand (the Act sets out specific requirements); or
>
> if it is proved to the court as a question of fact that the company is unable to pay its debts as and when they fall due.

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

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

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

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

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

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

Involuntary reorganisations

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

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

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

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

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

course.

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

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

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

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

Expedited reorganisations

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

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

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

The creditors then decide between three alternatives:

to execute a DOCA;

to wind up the company; or

to end the administration.

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

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

Unsuccessful reorganisations

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

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