Asia Pacific Guide to Lending and Taking Security - Australia

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# When considering whether to lend

## 1. Is it necessary or advisable for any lender, arranger, facility agent or security agent to be licensed, qualified or otherwise entitled to carry on business in this jurisdiction: (a) by reason only of its execution, delivery or performance of the finance documents; or (b) to enable it to enforce its rights under the finance documents?

**Execution, delivery or performance of the finance documents**

A lender, arranger, facility agent or security agent would be subject to regulatory regimes or licensing requirements where it is:

Carrying on "banking business" in Australia under the Banking Act 1959 (Cth) ("**Banking Act**"). A person who carries on banking business in Australia must be authorized by the Australian Prudential Regulation Authority (APRA) to be an authorized deposit-taking institution (ADI). However, an entity that merely lends to companies in Australia and does not take deposits will not be deemed to be carrying on banking business and will not require approval by APRA to be an ADI or be regulated by the Banking Act.

Carrying on a "financial services business" in Australia. An entity that carries on a financial services business in Australia must hold an Australian financial services license (AFSL) under Chapter 7 of the Corporations Act 2001 (Cth) ("**Corporations Act**"). However, credit facilities are generally excluded from the definition of "financial product" under the Corporations Act and the provision of a credit facility only to an Australian company will not trigger regulation by the Australian Securities & Investments Commission (ASIC) as a financial services business. However, the entry into related exchange contracts and derivative transactions may trigger regulation under the Corporations Act.

In addition, under Section 66 of the Banking Act ("**Section 66**"), an entity is prohibited from assuming or using certain restricted terms in Australia, including "bank," "banker" and "banking" (in any language) in relation to its financial business unless the APRA has granted permission otherwise. It is an offense with a civil penalty for each breach of Section 66. Therefore, a lender, arranger, facility agent or security agent that is a bank, or is related to a bank (and certain other types of financial institutions) must not breach Section 66 by assuming or using the word "bank," "banker" or "banking" (even in its corporate name) when dealing with an Australian counterpart.

In an open letter to foreign banks, the APRA has provided guidance that it would not consider a foreign bank to be in breach of Section 66 if all of the following conditions have been satisfied:

The foreign bank does not maintain an office or permanent staff in Australia, including staff employed by an entity within the banking group that conducts non-banking business on its behalf in Australia.

The foreign bank does not solicit business from retail customers in Australia.

All business contracts and arrangements are clearly transacted and booked offshore.

The foreign bank does not engage in advertising or allow bank staff to physically solicit business in Australia.

Where offshore staff of the foreign bank meet with clients and potential clients in Australia, it is for the limited purpose of arranging or executing documentation in relation to the business of those clients.

If all five conditions above have been satisfied, the APRA is also of the view that the foreign bank will not be in breach of Section 66 where it lends from offshore and uses restricted words such as "bank" to register a security interest over property in Australia, including on the Personal Property Securities Register (PPSR) established under the Personal Property Securities Act 2009 (Cth).

Please refer to the answer to question 11 of the "When lending to borrowers" section for information in relation to consumer credit regulation that may be applicable for consumer lending to individuals.

**Enforcement of rights under the finance documents**

Foreign investments in Australian entities, businesses and land are regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA), the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth), the Foreign Acquisitions and Takeovers Regulation 2015 (Cth) ("**Regulations**") and Australia's Foreign Investment Policy ("**Policy**").

The Australian Foreign Investment Review Board (FIRB) administers the FATA, the Regulations and the Policy. It also assists the Australian treasurer to make decisions on foreign investment proposals submitted for examination and approval.

Approval may be required under the FATA if a "foreign person" or "foreign government investor" is involved in an acquisition of an entity, business or land in Australia. However, there are exemptions in the situations set out below.

**Foreign persons whose ordinary business includes the lending of money: moneylending exemption**

A foreign person whose ordinary business includes the lending of money is exempted from the requirement to obtain the approval of the FIRB to take or enforce security over shares or other assets or over an interest in land, provided the interest is held solely by way of security for the purposes of a "moneylending agreement" (the “**moneylending exemption**”). A "moneylending agreement" is:

An agreement entered into in good faith, on ordinary commercial terms and in the ordinary course of carrying on a business (a “**moneylending business**”) of lending money or otherwise providing financial accommodation, except an agreement dealing with any matter unrelated to the carrying on of that business; and

For a person carrying on a moneylending business, or a subsidiary or holding entity of a person carrying on a moneylending business, an agreement to acquire an interest arising from a moneylending agreement (within the meaning of the above paragraph).

The moneylending exemption covers connected parties to reflect modern lending and debt trading practices. This includes any subsidiary or holding entity, a person who is in a position to determine the investments or policy of the lender, a security trustee, a receiver, or a receiver and manager appointed by a lender or another connected party.

Where the interest is in residential land or where the interest is acquired by a foreign government investor (as defined in the FATA and Regulations) by way of enforcement of a security, additional requirements must be met for the foreign person to benefit from the moneylending exemption. These are described below.

From 1 January 2021, the moneylending exemption will not apply to acquisitions upon enforcement of a security in national security land (which includes defense premises or land belonging to or relating to a national intelligence agency of the Commonwealth Government) or national security businesses (which includes a business carried on in Australia with respect to critical infrastructure, network telecommunications and national defense information and technology), unless a receiver or receiver and manager have been appointed to manage the process.

**Taking and enforcing security over residential land**

Where a foreign lender (other than a foreign government investor) takes security over, or acquires an interest by way of enforcement in, residential land, the moneylending exemption only applies where:

The lender (or its holding entity) is an ADI; or

The lender (or its holding entity) is otherwise licensed (in Australia or elsewhere) as a financial institution and either has at least 100 holders of securities in it or is listed on a stock exchange (in Australia or elsewhere).

**Foreign government investor lenders**

For an interest acquired by a foreign government investor by way of enforcement of a security, the moneylending exemption only applies in the following cases:

Where the foreign government investor is an ADI or a subsidiary of an ADI, it may acquire and hold an interest over shares, assets or land through enforcement of its security without FIRB approval for 12 months only. FIRB approval will be required for a foreign government investor to hold its interest in the shares, assets or land after the 12-month period, unless it is making a genuine attempt to dispose of the interest.

Where the foreign government investor is not an ADI or a subsidiary of an ADI, that entity may acquire and hold an interest through enforcement of its security without FIRB approval for six months only. Similarly, FIRB approval will be required for the lender to hold its interest after the six-month period unless it is otherwise making a genuine attempt to dispose of the interest.

## 2. Will any lender, arranger, facility agent or security agent be deemed to be resident, domiciled, carrying on business or subject to tax by reason only of the execution, delivery, performance or enforcement of the finance documents?

A lender, arranger, facility agent or security agent may be deemed to be carrying on business in Australia depending on the circumstances in each particular case. While lending to an Australian company on a one-off or very limited basis will, in most cases, probably not qualify as carrying on business in Australia, repeated lending and a course of dealing will most likely constitute carrying on business, which could trigger tax and/or other regulatory consequences. A foreign company that carries on business in Australia must be registered with the ASIC under the Corporations Act and comply with various disclosure and other requirements imposed on registered foreign companies under the Corporations Act.

In addition, there are events or circumstances that may result in a foreign lender, arranger, facility agent or security agent being taken to have a permanent establishment in Australia. Please contact our Australian tax group if you would like to receive further information in relation to the tax consequences.

No state or territory in Australia charges ad valorem stamp duty on loan and security documents — see also the answer to question 12 of the "If taking security" section.

The sale of secured property following enforcement can give rise to a liability for the security holder to pay goods and services tax (GST) on the sale, at the rate of 10% and liability for stamp duty if the sale of the property sold attracts duty, at normal conveyance rates. Land and goods will normally attract stamp duty. Stamp duty is charged on a state-by-state basis and, in most jurisdictions, is approximately 5% of the value of the property sold.

## 3. Are there any regulatory reporting requirements that lenders must observe in connection with those transactions?

Yes. In addition to reporting requirements applicable to an ADI under the Banking Act and an AFSL holder under the Corporations Act, a lender, arranger, facility agent or security agent may be subject to regulatory reporting requirements in the following instances:

If it is carrying on business in Australia and, if so, it must be registered with the ASIC under the Corporations Act.

If it is a "registrable corporation" under the Financial Sector (Collection of Data) Act 2001 (Cth) ("**FSCOD Act**"). A foreign corporation or a trading or financial corporation formed within Australia that engages in the provision of finance in the course of carrying on business in Australia is a "registrable corporation" if any of the following applies:

Its assets in Australia that consist of (outstanding) debts due (being debts resulting from transactions entered into in the course of providing finance) at any time exceed AUD 50 million or more. Examples of transactions entered into in the course of providing finance include lending money (with or without security), carrying out activities that directly or indirectly result in the funding or originating of loans or other financing, acquiring debts due to another person, and purchasing bills of exchange or promissory notes (Section 32 of the FSCOD Act).

The principal amounts of loans or other financing initiated (in the recently completed financial year) are AUD 50 million or more.

Registrable corporations must be registered with the APRA within 60 days, but they will not be subject to actual supervision by the APRA. They are subject to certain disclosure and reporting requirements.

The regulatory reporting requirements under the Corporations Act and/or FSCOD Act may apply to an entity as long as the above tests have been met, regardless of whether the entity is an ADI or an AFSL holder.

## 4. Is it necessary to establish a place of business in your jurisdiction in order to enforce any provision of the finance documents?

No.

## 5. Is a foreign bank/financial institution permitted to approach local entities for business?

No. A foreign bank that is not licensed as a bank in Australia must not engage in advertising or allow its staff to physically solicit business in Australia. This is one of the conditions set out by the APRA that is discussed in the answer to question 1 of this section. If the foreign bank fails to adhere to the five conditions set out by the APRA (as set out in the answer to question 1 of this section), the APRA may consider it to be in breach of Section 66.

If a financial institution is not a bank (and does not include the word bank in its name), there are circumstances in which it can approach Australian entities for business from offshore. There is currently\* an exemption for approaching wholesale clients wholly from offshore. There are also exemptions in relation to offering particular financial products (for example, derivatives or foreign exchange contracts) to professional investors (a subset of wholesale clients).

\* This exemption is set to expire on 31 March 2024.

# When lending to borrowers

## 1. Are there any restrictions in relation to the type of borrower who may borrow foreign currency or in relation to the term of foreign currency and/or the amount of foreign currency borrowed by local entities?

No, there are no restrictions of this type. However, the borrower should take into consideration the Australian thin capitalization rules — see the answer to question 6 of this section.

## 2. Are there any restrictions on the rate of interest or default interest that may be charged?

In principle, there are no restrictions of this type in the case of corporate borrowers (in contrast with individuals, who are protected by statutory usury provisions, and individuals and small businesses, who may be protected by unfair contract terms legislation). The interest or default interest is governed by the contractual arrangements between the parties and by common law. However, there may be circumstances in which the default interest may be considered an unenforceable penalty.

## 3. Are there any restrictions on particular lenders or classes of lender entering into credit transactions with borrowers?

Yes, certain restrictions apply in relation to lending in Australia.

Please refer to the answer to question 1 of the "When considering whether to lend" section for information in relation to when various regulatory regimes or licensing requirements apply.

Please refer to the answer to question 2 of the "When considering whether to lend" section for information in relation to when a lender may be required to be registered with the ASIC under the Corporations Act as it is carrying on business in Australia.

Please refer to the answer to question 3 of the "When considering whether to lend" section for information in relation to when a lender is a "registrable corporation" under the Financial Sector (Collection of Data) Act 2001 (Cth) and is required to be registered with the APRA.

Please refer to the answer to question 11 of this section for information in relation to consumer credit regulation.

Please also note that under the Foreign Acquisitions and Takeovers Act 1975 (Cth), certain lenders may have to obtain the prior approval of the Australian FIRB when taking or enforcing security over Australian land or assets. Certain exemptions apply, such as the moneylending exemption referred to in the answer to question 1 of the "When considering whether to lend" section. Please refer to that answer for more information in relation to the moneylending exemption.

## 4. Are there any exchange controls that will apply to payments to be made in foreign currencies or to foreign lenders?

No.

## 5. Is there any requirement to deduct or withhold tax from any amounts to be paid or repaid to a lender (whether domestic or foreign)? If so, at what rate must tax be deducted and from what kinds of payment?

Repayments of the principal of loans are not subject to taxation in Australia. However, interest withholding tax, at the rate of 10%, is payable on interest paid to a foreign resident lender not carrying on business through an Australian permanent establishment by an Australian resident borrower not operating through an offshore permanent establishment or a nonresident borrower carrying on business through an Australian permanent establishment. Certain exemptions and rate reductions apply, such as debts that qualify under the public offer test and situations where interest is paid to a foreign resident financial institution that qualifies for an Australian double tax treaty benefit.

## 6. Are there any “thin capitalization” or other rules that may limit the extent to which interest payments may be deducted for tax purposes?

The Australian thin capitalization rules may limit debt deductions for entities that are geared in excess of certain thresholds. Under the rules, debt deductions will be denied to the extent a taxpayer's debt level exceeds the "maximum allowable debt" threshold. Please contact our Australian tax group if you would like to receive more information in relation to the thin capitalization rules.

## 7. Are there any registration, notarization, translation or reporting requirements in relation to the loan documents?

No — see the answer to question 11 of the "If taking security" section for the requirements in relation to security documents.

## 8. Are there any stamp, documentary, registration, notarization or other taxes, duties or fees chargeable in relation to the loan documents? If yes, what are the amounts and when are they payable?

No — see the answer to question 13 of the "If taking security" section for the requirements in relation to security documents.

## 9. Does the law recognize the subordination of the debt that a debtor owes to one creditor to that which the debtor owes to another creditor? If yes, how is this usually effected?

Yes. The Corporations Act accepts subordination to which the subordinated creditor agrees. This is usually effected by contractual subordination, including intercreditor arrangements.

## 10. Are there any classes of unsecured and unsubordinated creditor whose claims against a debtor would rank equally with or above those of the debtor’s other unsecured and unsubordinated creditors (e.g., the claims of employees and tax authorities or the claims of creditors under particular kinds of instrument)? If yes, what classes of creditors are preferred?

All unsecured creditors rank equally, except for certain classes of claims that have priority. These classes include the following:

Costs and fees incurred by a liquidator or administrator.

Employees' (excluding directors and their relatives) unpaid wages, superannuation, leave entitlements, etc. — for more information, please refer to the answer to question 1 of the "If things go wrong" section under the sub-heading "Winding up".

## 11. Are there any consumer protection or similar laws that apply if credit is made available to individuals or other classes of debtor? If yes, what laws are applicable?

Yes, the Australian Consumer Law (ACL) is the national law in relation to fair trading and consumer protection. The full text of the ACL is set out in Schedule 2 of the Competition and Consumer Act 2010 (Cth). The protections in the ACL are generally reflected in similar provisions in the Australian Securities and Investments Commission Act 2001 (Cth) ("**ASIC Act**") so that financial products and services are treated in the same way.

The ACL and the ASIC Act apply if the debtor is a "consumer" or a "small business" (both of which are defined terms).

The National Credit Code and the National Consumer Credit Protection Act 2009 (Cth) ("**National Credit Act**") apply if, when the credit contract is entered into or (in the case of pre-contractual obligations) is proposed to be entered into, the following all apply:

The debtor is a natural person or a strata corporation (a defined term).

The credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes or to purchase, renovate or improve residential property for investment purposes or to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes.

A charge is or may be made for providing the credit.

The credit provider provides the credit in the course of the business of providing credit carried on in Australia or as part of, or incidentally to, any other business of the credit provider carried on in Australia.

Similar to the extended jurisdiction in respect of financial services, offshore conduct that is intended to induce people in Australia is considered to be carried out in Australia and subject to this regime. This is stated by the Australian legislature to be intended to capture credit providers who do not have a physical presence in Australia but may use the internet or intermediaries to offer consumer credit products to persons in Australia.

However, unlike the financial services regime, there is no clear exemption for activities with no solicitation by the provider. Therefore, where a loan request is made to an offshore lender, there is a risk that the resultant provision of credit is still a credit activity that is carried out in Australia.

This is consistent with ASIC guidance that even if only one of the borrowers is in Australia, the loan and the lending business is considered to be carried out in Australia.

The National Credit Act imposes a credit licensing regime and responsible lending obligations.

## 12. Are there any prohibitions or limitations on the extent to which a company can give financial assistance for the purchase of: (a) its own shares or those of any affiliated company; or (b) assets owned by it or any affiliated company?

Yes, there are restrictions on a company giving financial assistance to a third party to acquire its shares or its holding company's shares, except where giving the financial assistance does not materially prejudice the interests of the company or its shareholders, the company's ability to pay its creditors, or where the assistance is approved by the shareholders under what is called a "whitewash" procedure, or the assistance is exempted. The "whitewash" procedure generally involves the following:

Having the shareholders of the company approve the details of the financial assistance; and

Filing certain notices with the ASIC.

Financial assistance cannot be given until at least 14 days after the lodgment with the ASIC of the notice informing it of the intention to give financial assistance. This means that financial assistance can typically only be given after an acquisition has been completed.

There are, however, no equivalent prohibitions or limitations on the extent to which a company can give financial assistance for the purchase of assets owned by it or any affiliated company.

# If taking security

## 1. Are there any classes of unsecured and unsubordinated creditor whose claims against a debtor would rank equally with or above those of the debtor’s secured creditors?

No, in the case of a real property mortgage or a security interest in the company's noncirculating assets under the Personal Property Securities Act 2009 (Cth) (PPSA), provided that the security interest was duly perfected. A secured creditor's floating charge (see the answer to question 3 of this section) or security interest attached to circulating assets, however, would rank behind certain employee claims (such as unpaid wages, superannuation payments, etc.) and administrator's fees and expenses.

## 2. May security given by a company rank in a specified order so as to secure liabilities owed to different creditors of the company in that order and, if that is not possible, is it viable for parties to enter into a contractual arrangement for the purposes of moderating this order?

Yes, secured creditors may agree that their respective securities rank in any order.

## 3. Does this jurisdiction recognise the concept of floating security or similar equivalent (i.e., security over a changing pool of assets that the company giving the security is free to buy, sell and generally deal with)?

Yes. Floating charges and security interests attached to circulating assets are referred to as circulating security interests in the PPSA.

## 4. If so, are there any practical reasons why floating security is difficult to take, maintain or enforce?

No. However, please note that claims under a floating security rank behind certain employee claims and administrator's fees and expenses, as mentioned in the answer to question 1 of this section.

## 5. May security be granted to a trustee to be held on trust for the lenders from time to time, in such a way that a change of lenders does not require new security to be taken?

Yes.

## 6. If not, are there any techniques that can be used to achieve substantially the same effect (e.g., parallel debt structures)?

Not applicable.

## 7. If an agent holds security for the lenders rather than a trustee, is it necessary to take new security on a change of lenders? If no, why not? If yes, are there ways to structure the transaction to avoid such a requirement?

Although the concept of agency is recognized in Australia, a trustee usually holds the security.

## 8. Under the laws of this jurisdiction, is there any class of asset over which it is difficult or impossible to grant effective and perfected security, or in relation to which any security granted will be of limited effect?

Generally, no. However, and as mentioned in the answer to question 1 of this section, a secured creditor's floating charge or security interest attached to circulating assets would rank behind certain employee claims and administrator's fees and expenses.

## 9. Under the laws of this jurisdiction, are there any restrictions on offshore lenders taking security over any class of asset?

Generally, there are no such restrictions specific to offshore lenders. However, offshore lenders must comply with the FATA and FIRB requirements described in question 1 of the "When considering whether to lend" section.

## 10. Must a company receive a corporate benefit in return for giving a guarantee or security? In particular, are there restrictions on the grant of upstream and cross-stream guarantees and security? If yes, briefly what is the effect of these laws?

Yes. The enforceability of a guarantee or security may be affected by certain laws in Australia that require the guarantee to benefit the guarantor (known as "corporate benefit") or certain laws relating to creditors' rights and the giving of a financial benefit to a related party of a public company, which requires approval from shareholders. Companies should also observe financial assistance rules in Australia, as described in the answer to question 12 of the "When lending to borrowers" section. Apart from the above, unless there is a specific restriction contained in the constitution of the guarantor or the grantor of the security, there would not be other restrictions.

## 11. What type of security interests does your jurisdiction recognise, e.g., pledge, charge, mortgage, hypothecation? In relation to each type of security interest, please state the formalities required to create and perfect that security.

Types of security interest

Security over land in Australia is granted under a real property mortgage. In relation to other types of tangible and intangible personal property, the PPSA has introduced a new concept of a "security interest" that not only covers pre-existing forms of security interests, such as fixed charges, floating charges, pledges and liens but also extends to any interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation. This new concept of security interest includes an interest in personal property provided by a range of transactions that were previously not treated as security arrangements in Australia if the transaction, in substance, secures payment or performance of an obligation, such as flawed asset arrangements, retention of title arrangements and leases of goods.

Formalities

Generally, a real property mortgage must be registered in the relevant land register. Each Australian state and territory has its own land titles office that administers the land register in relation to that place. To be registered, the mortgage must be validly executed and sufficiently identify the land that is the subject of the mortgage, the debt secured by the mortgage and the interest in the land that is to be mortgaged. Various other local formalities for registration in each state or territory must also be complied with, including in relation to registration forms, execution requirements and requirements regarding relevant title certificates.

The formal requirements that apply to security over personal property are less prescriptive. Under the PPSA, the creation of an effective security interest in personal property generally requires the security interest to have "attached," be "enforceable against third parties" and be "perfected".

Attachment

"Attachment" occurs under the following conditions:

The grantor has sufficient rights in the collateral or power to transfer rights in the collateral to the secured party; and

Value is provided for the security interest or the grantor carries out an act by which the security interest arises.

This requirement is usually satisfied by the provision of a loan or other financial accommodation in return for the granting of the security interest or by the grantor signing a security agreement.

Enforceability against third parties

Being "enforceable against third parties" is a further step required by the PPSA and is satisfied when attachment has occurred and one of the following is satisfied:

The secured party has "possession" of the collateral.

The secured party has perfected the security interest by "control" of the collateral (which applies in relation to certain forms of personal property such as shares and certain bank accounts).

The grantor has signed a security agreement that describes the collateral.

Perfection

"Perfection" is the final formal requirement and occurs when the security interest is attached to the collateral, the security is enforceable against a third party and any of the following applies:

The secured party has "possession" of the collateral;

The secured party has "control" of the collateral (which only applies in relation to certain forms of personal property such as shares and certain bank accounts); or

A registration on the PPSR in favor of the secured party is effective with respect to the collateral (see the answer to question 12 of this section below).

## 12. Are there any registration, translation or notarization requirements in relation to security, guarantees, subordination or intercreditor documents?

Yes, there are registration requirements in relation to security in Australia.

For security over land, while it is not mandatory to register a mortgage if the mortgage is not registered, it will not have the benefit of registration and may be defeated by subsequent holders of legal interests in the land (including holders of subsequent mortgages). There is no prescribed time limit within which the registration of a mortgage must occur. However, until registration occurs, the secured party does not have the benefit of registration.

In relation to personal property, while registration is not mandatory, it is the most common method of perfection under the PPSA. The priority of unperfected security interests over personal property is generally deferred to perfected security interests and will generally vest in the grantor if the grantor becomes insolvent (i.e., it will not be enforceable against a liquidator or administrator of the grantor). For Australian companies and foreign companies doing business in Australia, the registration in respect of the security interest must generally occur within 20 business days of the creation of the security interest.

There are no registration requirements for guarantees and subordination or intercreditor agreements in Australia.

There are no translation or notarization requirements for security, guarantees and subordination or intercreditor agreements in Australia.

## 13. Are there any stamp, documentary, registration, notarization or other taxes, duties or fees chargeable in respect of security, guarantees, subordination or intercreditor documents? If yes, what are the amounts and when are they payable?

No state or territory in Australia charges ad valorem stamp duty on these documents. However, where the document contains a declaration of trust over cash receivables, such as the amount of a loan repayment, certain fixed duties may apply. Fees of a nominal amount are payable on the registration of security with the PPSR (see the answer to question 12 of this section).

# If things go wrong

## 1. Please provide a brief description of the insolvency regime. In particular what rights and duties do unsecured and secured lenders have on the insolvency of a debtor? Are there any other matters of concern?

Australia has a number of formal corporate insolvency processes, as set out below:

Voluntary administration

A deed of company arrangement

Restructuring and a restructuring plan

Provisional liquidation

Liquidation/winding up

Receivership

A scheme of arrangement

These processes may operate sequentially, concurrently or as alternatives.

**Voluntary administration**

The voluntary administration regime in the Corporations Act is the most widely used formal corporate insolvency mechanism. A voluntary administration may be commenced by any of the following:

The directors of a company resolve that, in their opinion, the company is, or is likely to become, insolvent and that an administrator should be appointed.

A liquidator or provisional liquidator if they think that the company is insolvent or likely to become insolvent.

A secured creditor is entitled to enforce a security interest over the whole or substantially the whole of the company's assets.

Administrators' fees and expenses and employee entitlements ordinarily take priority over assets subject to a circulating security interest in external administration.

The administrator's right of indemnity out of the property of the company (for debts or liabilities incurred by the administrator and for the administrator's remuneration) takes priority over:

Unsecured debts of the company; and

Any debts secured by any circulating security interest (such as cash, receivables and inventory).

The administration usually ends after creditors resolve at the second meeting of creditors to:

End the administration and return control of the company back to its directors.

Enter into a deed of company arrangement if one has been proposed; or

Have the company wound up.

Therefore, the voluntary administration process is very much creditor controlled.

**Deed of company arrangement**

A deed of company arrangement (DOCA) is a very flexible restructuring agreement between a company and its creditors. The terms of a DOCA are, in essence, limited only by the imagination of the draftsperson, and may allow the debtor company to:

Trade on, whether under the control of its directors, deed administrators or receivers appointed by a secured creditor; or

Provide for the sale of assets, for the sale or issue of equity or for creditors' claims to be transferred to a creditors' trust or another entity in a corporate group.

A DOCA will provide for the contribution to a fund for the distribution of dividends to creditors in return for a release of creditors' claims against the company.

A DOCA must give employee entitlements, such as wages, statutory priority to which the employees would be entitled in a winding up out of assets of the company, unless the employee creditors vote to modify this priority.

Significantly, a DOCA may bind secured creditors of a debtor company, even if they vote against or abstain from voting on the resolution to enter into the DOCA, but a DOCA leaves secured creditors free to deal with their security outside the DOCA.

Restructuring - restructuring plan

The new process of "restructuring" was introduced to the Corporations Act from the start of 2021.

The process has many similarities to voluntary administration, but unlike that process, it is a debtor-in-possession regime. The process is initiated by the directors, who appoint a restructuring practitioner to have oversight of the restructuring. To be eligible, companies must have liabilities of less than AUD 1 million (including contingent and future liabilities) and must not have used the process within the preceding seven years.

Like an administration, the restructuring practitioner's fees and expenses ordinarily take priority over assets subject to a circulating security interest.

The restructuring practitioner's right of indemnity out of the property of the company (for debts or liabilities incurred by the restructuring practitioner and for the restructuring practitioner's remuneration) takes priority over the:

Unsecured debts of the company; and

Any debts secured by any circulating security interest (such as cash, receivables and inventory).

The company develops a restructuring plan that is put to creditors. The "restructuring" phase will ordinarily end following a vote by creditors about this plan. The vote takes place without a formal meeting. There are two possible outcomes of the vote: either the restructuring plan is adopted (in which case it will become binding) or it is rejected by the creditors.

The intent of the restructuring plan is to create a fund that is used to pay creditors in return for compromising their claims against the company. The restructuring plan:

Will identify what property of the company will be dealt with under the plan and its anticipated value, how it will be dealt with and, if sales are proposed, how they will take place; and

Must provide that all admissible debts and claims rank equally.

As the restructuring plan cannot be proposed unless all outstanding employee entitlements have been paid, and as future employee entitlements are excluded from its operation, employee entitlements are given no specific priority in the plan itself.

A secured creditor is only bound by the restructuring plan:

To the extent that the value of the assets that are the subject of its security is less than its debt (and then to the extent of its unsecured claim); and

Otherwise, only to the extent that the secured creditor consents to be bound by the plan.

**Provisional liquidation**

The Federal Court of Australia or the Supreme Courts of the states and territories of Australia may appoint a provisional liquidator to the company. The court may appoint a provisional liquidator if a valid winding up application has been made and it is reasonably likely that a winding up order will be made. A provisional liquidator's primary duty is to preserve the status quo to ensure the least possible harm to all parties and to enable the court to decide, after further examination, whether the company should be wound up.

**Winding up**

A winding up (or liquidation) on insolvency is a terminal procedure intended to realize a company's assets and distribute the assets among its creditors.

A court-ordered or compulsory winding up can only be effected by an order of the Federal Court of Australia or the Supreme Courts of the states and territories of Australia.

A creditors' voluntary winding up usually commences either:

Pursuant to a special resolution of the company's members in circumstances where there is no declaration of solvency made by the directors of the company; and

By resolution of creditors at a second meeting of creditors of a company in voluntary administration.

In a winding up, all unsecured creditors with debts or claims against the company are entitled to participate in seeking payment of a dividend from the available assets if the circumstances giving rise to their debt or claim arose before the "relevant date." The relevant date is usually the date on which the winding up order was made or the date of the appointment of the administrator in a preceding voluntary administration.

Claims are submitted to the liquidator pursuant to a statutory proof of debt procedure.

Secured creditors are generally entitled to enforce their security interest during the liquidation. However, a secured creditor's claim to assets subject to a circulating security interest (usually cash, receivables, inventory and similar assets) may be subordinated to specified employee claims such as wages, superannuation, and leave and redundancy entitlements, where the property of the company is insufficient to meet payment of those employee claims.

The following specified priority debts and claims will take priority over the claims of unsecured creditors:

Expenses incurred by an administrator or liquidator to preserve and realize the property of the company.

The costs and expenses of obtaining any order for liquidation.

Priority employee entitlements.

**Receivership**

A secured creditor may appoint its own receiver "over the top" of the administrator — generally, provided it does so within 13 business days of the appointment of the administrator. The court may also appoint a receiver in exceptional circumstances. If the secured creditor appoints a receiver, the receiver assumes effective control of some or all of the company's assets (depending on the terms of the charge or security) with a view to realizing enough of the charged assets to repay the debt owed to the secured creditor. Concurrent receiverships and administrations are common.

While secured creditors are subject to a moratorium, the administrator is not at liberty to deal with the assets that are the subject of secured creditors' rights without the secured creditors' consent, leave of the court or unless it is in the ordinary course of business.

A receiver has no direct role in relation to the unsecured creditors of the company.

**Schemes of arrangement**

A scheme of arrangement is a mechanism that may be used by a solvent or insolvent company to reach an agreement or compromise with its creditors or members, or both. Schemes of arrangement are, however, less commonly used as a restructuring process, due to the time and cost associated with their implementation.

## 2. Is it possible to obtain a moratorium before insolvency?

As a general proposition, no. Australia has introduced a "safe harbor" regime that protects directors from personal liability for insolvent trading. The regime does not provide any moratorium for claims against the company itself.

A discussion of the moratoria that arise after the commencement of formal insolvency processes is set out below.

Voluntary administration

The voluntary administration procedure imposes a statutory moratorium in respect of claims and proceedings against the company during the period of the voluntary administration.

Subject to a few limited exceptions, unless consent of the administrator or the court is first obtained, the following will apply during the period of the voluntary administration:

Creditors will be prohibited from taking any action against the company to recover debts, enforce security interests or have the company wound up.

Owners or lessors of property that is being used by the company (including landlords and retention of title suppliers) will be prohibited from seizing or reclaiming their property.

There is also a general prohibition on the transfer of shares of a company in administration and a moratorium on the enforcement of guarantees given by directors, their spouses or relatives.

The statutory moratoria ceases once the company proceeds to liquidation or a DOCA, although other moratorium provisions will then apply.

Receivership

There is no moratorium or stay in relation to the enforcement of claims against a debtor company where it is only in receivership. However, where a receivership is concurrent with an administration, the receiver will effectively have the benefit of the statutory moratorium applicable in the administration.

Deed of company arrangement

The Corporations Act specifies certain minimum requirements of a DOCA, including the nature and duration of any moratorium period.

**Restructuring - restructuring plan**

The restructuring process attracts similar moratoria for claims against the company as the voluntary administration process.

Creditors bound by the restructuring plan cannot apply or proceed with an application to wind up the company or begin or proceed with court proceedings or enforcement of court orders, where to do so would rely on a debt compromised by the plan.

Winding up

In a winding up, there is a statutory stay of proceedings against the company and a prohibition on enforcement (by unsecured creditors) against the property of the company other than with the consent of the liquidator or leave of the court. Unsecured claims against the company should generally be pursued under the proof of debt procedure.

Dealings with the property of the company after a winding up other than by the liquidator are void.

**Prohibition on use of *ipso facto* clauses**

There is a statutory moratorium on the enforcement of ipso facto clauses in pre-insolvency contracts entered into on and from 1 July 2018 to enable the proper facilitation of some of the insolvency processes identified above. This stay does not apply to variations to or novations of contracts where the original contract was entered into prior to 1 July 2018, but only where such variation or novation is made before 1 July 2023. From 1 July 2023, these carve-outs for varied or novated contracts will cease to apply.

An ipso facto clause is a clause in a contract that permits the other contracting party to either terminate or modify the operation of the contract due to an insolvency event occurring.

A contracting party is restricted from enforcing such a right while the insolvent party is undergoing a voluntary administration process, a restructuring, a receivership over all or substantially all the assets of the company, or a scheme of arrangement undertaken by reason of the company's insolvency. Therefore, the other contracting party will not be entitled to rely on the ipso facto clause to terminate the contract or modify or accelerate any payments under the terms of the contract in reliance on the insolvency event.

Importantly for lenders, there are various exclusions to the operation of the restriction. A significant exclusion is for lenders in respect of rights to enforce security agreements with obligors (but note the discussion below in question 4, dealing further with the enforcement of security agreements in a formal insolvency context). There are numerous other exemptions to the stay. In the event that a restriction imposed on the enforcement of an ipso facto clause is relevant to you, we recommend that you take specific advice in relation to those exemptions relevant to your circumstances.

## 3. When a company is the subject of a formal insolvency procedure, can the company’s pre-insolvency transactions be set aside?

Yes, in certain circumstances. There is a range of actions that become available to a liquidator when a company is wound up, which can involve challenges to pre-insolvency transactions.

Liquidators have broad powers to investigate the affairs of the company, including compulsory powers to compel the assistance of directors and officers as well as the production of books and records and to require the attendance of persons before a court to face examination.

Liquidators may also have various causes of action available to them to recover assets or undo certain transactions, including recovering preferential payments, unwinding uncommercial transactions and setting aside unfair loans and unreasonable director-related transactions. Financing transactions are not immune from those causes of action as set out below.

Unfair preferences

A liquidator may recover, as an unfair preference, payments made to, or benefits received by, a creditor of the company in respect of an unsecured debt owed by the company within a period of six months prior to the deemed commencement of the winding-up, if:

That unsecured creditor was preferred over other unsecured creditors; and

The payment or benefit was received at a time when the company was insolvent or the company became insolvent as a result of making that payment or giving that benefit.

There are various defenses to an unfair preference claim, including that the payment(s) were received in good faith or that a "running account" existed between the creditor and the debtor.

A grant of security for a previously unsecured debt may constitute an unfair preference that can be avoided by a liquidator under this cause of action.

Rights to recover unfair preferences may be more restricted where the company has undergone a liquidation using the simplified liquidation regime. Such a regime is only available for companies with liabilities of less than AUD 1 million.

Uncommercial transactions

An uncommercial transaction of the company entered into within two years prior to the deemed commencement of the liquidation is voidable on the application of the liquidator if it was entered into, or given effect to, at a time when the company was insolvent or if the company became insolvent as a result of it entering into the transaction.

Whether a transaction is "uncommercial" is assessed by reference to, among other factors, the benefits and detriment to the company and to other parties entering into the transaction. There are various defenses to an uncommercial transaction claim.

Certain financing transactions may be capable of being attacked as uncommercial transactions, for example, the granting of security for previously unsecured debts or the granting of guarantees for the indebtedness of third parties.

## 4. When can a lender enforce its security? Can security be enforced out of court following an event of default (or other contractual trigger event), or is a court order required? Are there any restrictions that apply before a lender may enforce its security?

As a general proposition, a secured lender will be free to enforce its security at any time following an event of default by a debtor on the terms of the relevant security instrument and without a court order. However, a secured lender may need to obtain a court order permitting the enforcement of its security where, for example, there is some defect or ambiguity in the security instrument. In relation to security over real estate and certain other types of assets, various notice requirements may also apply before enforcement action may be taken (or a sale of the secured property effected).

The other restriction is that if a voluntary administrator is appointed to a debtor or a restructuring is commenced, then the secured lender, if it has security over the whole, or substantially the whole, of the property of the debtor, has 13 business days from the appointment of the voluntary administrator or the commencement of a restructuring to elect to appoint a receiver.

Depending on the nature of the security, for example, if the security is a possessory security interest, further restrictions on enforcement rights during an administration or restructuring may apply.

## 5. Do any limitation periods apply in relation to bringing an action to enforce security?

Yes. However, as Australia is a federation of states and territories, each of which may have its own peculiar laws concerning the limitation of actions for suing on securities and in respect of interests in land, the relevant time limits will turn on the facts. Expert assistance should be sought in relation to particular enforcement scenarios.

## 6. Is there any particular way in which secured assets must be liquidated on enforcement (e.g., by auction or court sale)?

No, but as a general proposition, mortgagees and receivers are under a duty, when exercising a power of sale of secured property, to take all reasonable care to obtain either of the following:

Not less than market value for the property if, when it is sold, it has a market value; or

The best price reasonably obtainable if it does not have a market value.

To best protect themselves from liability, mortgagees and receivers will typically obtain independent valuations of secured assets prior to attempting to sell those assets and will then often engage in a public sale process or campaign to generate interest in the asset, for example, by public auction, tender or expressions of interest.

## 7. Are there any particular legal or practical difficulties or delays in enforcing security?

Where the relevant security instruments are immediately enforceable in accordance with their terms, the enforcement and sale of the security property can be straightforward and completed relatively quickly.

However, that process can be complicated or delayed in any number of ways where third parties seek to intervene, for example, where competing interests are claimed in land or where a challenge to the relevant power of sale is commenced.

The possibility of a voluntary administration or restructuring moratorium (discussed in the answer to question 2 of this section) must also be kept in mind.

## 8. In relation to enforcement, are there any specific requirements to be borne in mind if the lender is a foreign entity?

Issues may arise for a foreign entity that is the mortgagee of land and wishes to acquire the relevant secured property (if it is real property) (rather than exercising a power of sale to a third party) in the event of a default by the mortgagor. In that case, the mortgagee may first need to obtain approval from the FIRB before completing the acquisition. Similar considerations may also apply if the security is over shares in an Australian listed company.

For more information regarding the enforcement of security by a foreign entity, please see the answer to question 1 of the "When considering whether to lend" section.

Separately, the insolvency process may be complicated if a debtor company has assets in multiple jurisdictions or where there are concurrent foreign and local proceedings regarding the debtor company. However, the UNCITRAL Model Law on Cross Border Insolvency has been adopted in Australia in the Cross-Border Insolvency Act 2008 (Cth), which may be invoked by the application for "recognition of a foreign proceeding." The process that flows is designed to facilitate multijurisdictional insolvencies and can be a useful tool in these scenarios.

## 9. Is there any reason why you think that arbitration rather than litigation might be advantageous in resolving disputes under the finance documents, and if so, why? Please outline the relative merits of arbitration and litigation, including the ease of enforcement of foreign judgments and foreign awards from different jurisdictions. Is it possible to rely on a hybrid enforcement provision that allows the lenders to opt for either arbitration or litigation as they see fit?

The key advantage of arbitration is the availability of arbitral awards being enforced in over 150 countries that are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This means that an award made in one state that is party to the New York Convention can be enforced by the courts of any other state party (e.g., where the award debtor has assets) as a judgment of the court. There are limited grounds (relating to procedural issues and public policy) on which a court can refuse to enforce an award.

Foreign judgments can generally be enforced in countries and from countries where reciprocal arrangements have been established if there are no reciprocal arrangements, parties seeking to enforce a foreign judgment in Australia will need to rely on common law principles.

Other advantages of arbitration include that an award is final and binding and cannot be appealed. It can only be challenged on limited procedural grounds or public policy. Litigation generally permits appeals (either by right or by leave) that may involve one or more layers of appeal and involve additional time, cost and complexity. However, the right to appeal in litigation may also be considered an advantage, depending on the circumstances of the case.

In addition, arbitration proceedings in most places (including Australia) are confidential unless the parties expressly agree otherwise. Litigation is generally conducted in public, with the decision also being made available to the public.

Other advantages of litigation include the certainty of the procedure of the courts and costs and efficiency. Compared with other jurisdictions, Australian courts are known to finalize matters promptly and efficiently. The courts also have the power to join additional parties to proceedings (provided they are subject to the court's jurisdiction). With arbitration, the powers of the tribunal are more limited to those powers given by the parties in the arbitration agreement or by the arbitral rules or the law that applies. For example, they cannot join parties unless the parties have consented to arbitration.

A hybrid enforcement clause that allows for the election by one party to pursue claims through litigation or arbitration is enforceable in Australia.

## 10. Are asymmetrical jurisdiction clauses enforceable? (By this we mean clauses that allow the lenders, but not the borrowers, to make certain choices in relation to choice of jurisdiction and how to litigate. These types of clauses allow the lenders, but not the borrowers, to commence proceedings in any court they choose, but restrict the borrowers to commencing proceedings in one jurisdiction only. This may also allow the lenders, but not the borrowers, to choose whether to litigate the finance documents before a court or to submit to arbitration in relation to them, but restrict the borrowers to either litigation or arbitration, as specified in the agreement).

It is common for an option clause (where one party may choose arbitration over litigation or vice versa) to be included in finance documents. These clauses have not yet been tested in the Australian courts but they have been enforced by the English courts. The definition of an "arbitration agreement" under the International Arbitration Act 1974 (Cth) would appear to be broad enough to cover these option clauses. There is nothing in the Act or the general law that would prevent a party from agreeing to this type of option clause.

Asymmetrical jurisdiction clauses that purport to restrict the right of one party to commence proceedings in one jurisdiction but permit the other party to commence proceedings in any jurisdiction have not been considered in the Australian courts. It is likely that, if faced with this type of clause, an Australian court would resolve the issue of whether it had jurisdiction by reference to the common law principle of forum non conveniens.

# Working digitally

## 1. Is it possible for documents to be executed electronically (whether by the manual insertion of a digital signature or the use of an e-signing platform) under the laws of this jurisdiction? If so, is this limited to only particular types of finance documents?

The electronic execution of documents may be permitted in Australia, depending on the following:

The type of document, that is, whether the document is an agreement or a deed.

If the document is to be signed by a natural person or a corporation.

**Execution by natural persons**

Generally speaking, agreements can be signed electronically by natural persons. However, certain types of agreements must be signed in wet ink (such as mortgage documents to be lodged with the relevant land registry) unless electronic execution is expressly permitted in the relevant legislation or by the relevant authority. See the answer to question 3 of this section for further details.

In respect of deeds, the electronic execution of deeds has historically been problematic due to the long-standing common law requirement for deeds to be written on parchment or paper and, therefore, requiring wet ink signatures. However, the electronic execution of deeds by natural persons is now allowed in the following jurisdictions:

New South Wales (NSW) under the Conveyancing Act 1919 (NSW).

Queensland under the Property Law Act 1974 (Qld) pursuant to amendments passed by the Justice and Other Legislation Amendment Act 2021 (Qld) — except for powers of attorney by individuals in deeds and general powers of attorney, which must be a physical document and witnessed (subject to limited exceptions).

Victoria under the Electronic Transactions (Victoria) Act 2000 (Vic) pursuant to amendments passed by the Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021 (Vic).

No other Australian states have enacted measures concerning the electronic execution of deeds by natural persons.

**Execution by corporations**

Corporations registered under the Corporations Act can sign documents electronically by its authorized agent under Section 126 of the Corporations Act or by its directors and company secretaries under Section 127 of the Corporations Act.

However, if a corporation signs by an authorized agent, the other parties to the contract may not rely on the assumption in Section 129(5) of the Corporations Act, which provides that a person may assume that a document has been duly executed by a company if it is executed in accordance with Section 127(1) of the Corporations Act.

Under Section 127(1) of the Corporations Act, a corporation may execute a document without a common seal if the document is signed by any of the following:

Two directors of the company;

A director and a company secretary of the company; or

For a proprietary company that has a sole director who is also the sole company secretary — that director

Electronic execution and split execution under Section 127(1) of the Corporations Act is allowed pursuant to amendments to the Corporations Act passed in the Corporations Amendment (Meetings and Documents) Act 2022 (Cth), which came into force on 22 February 2022.

The latest amendments to the Corporations Act under the *Treasury Laws Amendment (Modernising Business Communications and Other Measures) Act 2023* (Cth) closed several existing gaps, confirming that any document required or permitted to be signed under the Corporations Act can now be signed physically or electronically. In addition, electronic signing is expressly allowed for other documents that require a signature such as directors' annual reports and declarations and creditors' statutory demands.

**Split execution by directors**: Section 110A of the Corporations Act permits directors to sign a copy or counterpart of a document (including a deed) by wet ink or electronically without the need for that copy or counterpart to include the signature of the other company officer signing the document. Each director must sign a complete copy of the document.

**Electronic signature by directors**: For electronic execution of a document (including a deed) to be effective, the following conditions must be met:

A method of signing is used to identify the person in the electronic signature and to indicate the person's intention to sign a copy or counterpart of the document. Platforms such as DocuSign would appear to satisfy this requirement.

The copy or counterpart includes the entire contents of the document.

The method used to sign electronically is "as reliable as appropriate for the purpose for which the information was recorded, in light of all the circumstances, including any relevant agreement" or is proven, in fact, to have identified the signatory and the signatory's intention in respect of the contents of the document, by itself or together with further evidence.

In practice, when a company is executing a document under Section 127 of the Corporations Act, directors can sign electronically, provided that the method used identifies the signatory and indicates their intention. This can be done in one of two ways:

By applying an electronic or digital signature through an application such as Adobe Sign or DocuSign, which would appear to be valid under the act without further evidence, as these applications use authentication technology to verify the signer's identity.

By applying an "e-signature," for example by "copy and pasting" an image of the signature into a document. This method would require further evidence of the signatory's identity and intention (for example, through a confirmatory email) given the risk that the e-signature could be applied without the signatory's consent.

## 2. Where the witnessing of a signing is contemplated, is it possible for the witness to verify the signature over a live video call?

Regarding corporations, witnessing the affixation of a common seal can be done remotely under Section 127(2A) of the Corporations Act. Witnessing a signing is not otherwise required under the Corporations Act and depends on the laws of the relevant State.

Remote witnessing is now available in NSW, Queensland and Victoria:

In NSW, the Electronic Transactions Act 2000 (NSW) allows for remote witnessing by live audio-visual link, subject to procedural requirements.

In Queensland, the Property Law Act 1974 (Qld) and the Powers of Attorney Act 1998 (Qld) permit deeds and general powers of attorney for corporations to be executed electronically without a witness. Witnessing of the signing of affidavits and statutory declarations may also be done by audio-visual link, subject to procedural requirements.

In Victoria, the Electronic Transactions (Victoria) Act 2000 (Vic) permits witnessing to occur via audio-visual link for most documents (including deeds), subject to procedural requirements. With the exception of testamentary instruments and power of attorney documents, the witness does not need to be physically located in Victoria. All of the witnessing requirements must be satisfied on the same day.

In other Australian jurisdictions, specific legislation allowing for the remote witnessing of documents typically used in financing transactions does not currently exist or has expired (in the case of temporary COVID-19 measures).

## 3. Is it possible to register/perfect security electronically without wet ink signatures?

**Real property**

With the exception of NSW, Victoria and South Australia, wet ink signatures are ordinarily required for a real property mortgage to be validly executed and thereafter registered in the relevant land register.

In particular, in Queensland, wet ink signatures are still ordinarily required for the execution of mortgage documents that are intended to then be delivered to the land register for registration. However, mortgages lodged electronically in accordance with the Electronic Conveyancing National Law (Queensland) are permitted to be electronically signed.

**Personal property**

Security over personal property governed under the PPSA may be perfected by "possession", "control" or registration on the PPSR (see the answers to questions 10 and 11 of the "If taking security" section for more details). The process of registering a security interest on the PPSR is completed online and no further signatures from the grantor or secured party will be required to complete the process. However, it will be necessary to examine if the underlying security agreement has been executed validly in accordance with the formalities described in the answer to question 1 of this section.

## 4. Are there any other legal restrictions that may prevent the parties from executing a finance transaction electronically?

There are no other restrictions apart from those above. As discussed, only some of the COVID-19 emergency measures put in place during the pandemic have been permanently adopted under statute and the specific formalities will depend on the jurisdiction under which the documents are signed.

# Contributors

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