Global Restructuring and Insolvency Guide - Australia

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# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Creditors' scheme of arrangement**

While not typically a part of the implementation of a creditor's scheme of the arrangement, more generally, a creditor can take security over all types of assets, including accounts receivable. This is most commonly effected through a general security deed, subsequently registered on the Personal Property Securities Register granting the secured creditor security over "all present and after-acquired property" ("**ALL PAP**") of the grantor of the security.

**Receivership**

A creditor is able to take security over all types of assets, including accounts receivable. This is most commonly effected through a general security deed, subsequently registered on the Personal Property Securities Register granting the secured creditor security over ALL PAP of the grantor of the security. Having this kind of security is typically a prerequisite to conducting an effective receivership.

**Liquidation**

Yes. A creditor is able to take security over all types of assets, including accounts receivable. This is most commonly effected through a general security deed, subsequently registered on the Personal Property Securities Register1 granting the secured creditor security over ALL PAP of the grantor of the security.

Doing so opens up the availability of private receivership as a recovery pathway (see the column on Receivership in this section).

**Voluntary administration/deed of company arrangement**

Yes. A creditor is able to take security over all types of assets, including accounts receivable. This is most commonly effected through a general security deed, subsequently registered on the Personal Property Securities Register1 granting the secured creditor security over "all present and after acquired property" of the grantor of the security.

Doing so opens up the availability of private receivership as a recovery pathway (see separate section on receivership).

**Restructuring**

Yes. A creditor is able to take security over all types of assets, including accounts receivable. This is most commonly effected through a general security deed, subsequently registered on the Personal Property Securities Register2 granting the secured creditor security over ALL PAP of the grantor of the security.

Doing so opens up the availability of private receivership as a recovery pathway (see the column on Receivership in this section).

1 The Personal Property Securities Register is enabled under the Personal Property Securities Act 2009 (Cth).

2 Ibid.

## What is the nature of the insolvency process?

**Creditors' scheme of arrangement**

A creditors' scheme of arrangement is a compromise or arrangement between a company and its creditors (or some of them) effected pursuant to the process prescribed in Chapter 5.1 of the Corporations Act 2001 (Cth) ("**Corporations Act**").

A company may be reorganized or restructured through a scheme of arrangement. This process requires:

The Australian Securities & Investments Commission (ASIC) being provided with a draft of the scheme documents to be sent to affected creditors (colloquially referred to as a scheme booklet) at least 14 days in advance of the initial or first court hearing:

An initial or first court hearing at which orders are made convening a meeting or meetings of the affected creditors and to seek approval of the material to be dispatched to those creditors

A meeting or meetings of the affected creditors be held to vote on the proposed scheme of arrangement

A second court hearing to approve the proposed scheme of the arrangement, assuming the requisite majority has passed it at the meeting or meetings of affected creditors

The lodgment of the orders made at the second court hearing with ASIC in order for the creditors' scheme of arrangement to become effective

**Receivership**

A receiver (often appointed as a receiver and manager) is the most common form of what is referred to as a controller in the Corporations Act. A controller can also include a mortgagee in possession or their agent.

A receiver is generally privately appointed by a secured creditor over some or all of the property of the company that is subject to their security interest. The purpose is to realize the secured property and apply it in the reduction of the secured debt.

A court may also appoint a receiver.

Procedurally, the appointment of a receiver is affected by the execution of a deed of appointment by the secured creditor and the proposed receiver after any necessary procedural formalities arising from the underlying security agreement or applicable legislation have been complied with.

It is also standard practice for the secured creditor to indemnify the receiver appointed for any liabilities of the receiver incurred during the course of the receivership. This indemnity is usually set out in a separate deed of indemnity.

A receiver must be a registered liquidator with ASIC. Additionally, a range of circumstances disqualifying a person from accepting an appointment as a receiver is designed to ensure that receivers are appropriately independent.

It is usual to have two or more receivers appointed jointly and severally, to ensure appropriate continuity in the event of absence or ill health.

**Liquidation**

A winding-up (also known as liquidation) in insolvency is a terminal procedure intended to realize a company's assets and distribute them amongst its creditors in accordance with the priorities in the Corporations Act.

For an insolvent company, a winding-up can take the form of either a court-ordered or compulsory winding-up or a creditors' voluntary winding-up.

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

Creditors of the company and certain other eligible applicants can apply to the court to have a company wound up on a range of bases, including insolvency. The most common ground for a winding-up application in insolvency is the company's failure to comply with a creditor's statutory demand for payment, which gives rise to a statutory presumption of insolvency. The statutory presumption arises when a company fails to comply or apply to a court to set aside the statutory demand within 21 clear days of the statutory demand being issued. It is still possible to wind a company up based on insolvency by actually proving insolvency.

If the winding-up application is successful, the court will order that the company be wound up. Upon making a winding-up order, the court will appoint a liquidator. The selection of the liquidator can be nominated by the creditor filing the winding-up application by filing a "consent to act" signed by the preferred liquidator or made by the court, so long as the liquidator is a registered liquidator with ASIC.

A creditors' voluntary winding-up usually commences in either of these circumstances:

Pursuant to a special resolution of the company's shareholders in circumstances where the directors of the company make no declaration of solvency

As is now very common, by resolution of creditors at the second meeting of creditors held in the company's voluntary administration (see the column on Voluntary administration/deed of company arrangement in this section)

A liquidator appointed in a creditors' voluntary winding-up must be a liquidator, appropriately qualified and registered with ASIC, and not disqualified from accepting the appointment.

It is usual to have two or more liquidators appointed jointly and severally, to ensure appropriate continuity in the event of absence or ill health.

**Voluntary administration/deed of company arrangement**

The primary objective of a voluntary administration is to provide for the business, property and affairs of an insolvent company to be administered in a way that either:

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

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

The voluntary administration process gives a company a short breathing space, during which there is a general moratorium on the enforcement of creditors' claims. It enables the administrator to continue to trade the company's business during the administration period and for any proposal to rehabilitate the company or otherwise maximize returns to creditors (other than via an immediate winding-up) to be put before creditors and, if approved, implemented via a deed of company arrangement (DOCA). A DOCA will be binding on key stakeholders, including the company, its shareholders and its creditors (save for secured creditors who do not vote in favor of the DOCA).

**Commencement**

A voluntary administration is usually commenced by the directors of a company, resolving that, in their opinion, the company is insolvent or is likely to become insolvent at some future time and that an administrator should be appointed.

Although less common, a secured creditor who is entitled to enforce a security interest over the whole or substantially the whole of the property of the company or a liquidator of the company may also appoint an administrator in certain circumstances.

The consent of the proposed administrator must be obtained before the appointment is effective. The administrator must be a registered liquidator with ASIC and must not be disqualified from accepting the appointment under the Corporations Act.

It is usual to have two or more administrators appointed jointly and severally, to ensure appropriate continuity in the event of absence or ill health.

The administrator must investigate the financial situation and affairs of the company and recommend to the company's creditors in the report whether it is in their interests to do the following:

End the voluntary administration and hand the company back into the control of its directors (which is uncommon and would only be appropriate if the company is solvent)

Have the company enter into a DOCA (if one has been proposed)

Have the company wound up by transition to a creditors' voluntary winding-up

The voluntary administration usually ends when creditors resolve at the second meeting of creditors in favor of one of these options or if the creditors resolve that the company enter into a DOCA, on its execution.

**Restructuring**

In a restructuring, eligible companies work with a Restructuring Practitioner to develop and propose to creditors a restructuring plan. Restructuring is a debtor-in-possession regime, with control of the company remaining with the directors throughout the process. A Restructuring Practitioner must be registered with the ASIC as a registered liquidator.

A company will be eligible to use the restructuring process in the following scenarios:

Its total liabilities do not exceed USD one million.

No current director, or director from the preceding 12 months, has also been a director of another company that, in the preceding seven years, has been through a restructuring.

The company itself has not undertaken a restructuring process within the last seven years.

The company is not already under restructuring or subject to any other form of external administration.

The company has 20 business days after the appointment of the Restructuring Practitioner to prepare with the assistance of the Restructuring Practitioner and sign a restructuring plan. This period can be extended by the Restructuring Practitioner once (and by no more than ten business days) or by the Court on application by the company.

The restructuring plan must ensure the following:

Identify what company property is to be dealt with under the restructuring plan and how that property will be dealt with.

Provide for the remuneration of the Restructuring Practitioner for the restructuring plan.

Be accompanied by a restructuring proposal statement, which must include a schedule of debts and claims for each of the creditors.

Specify the date on which the restructuring plan was executed.

A secured creditor will only be a creditor and bound by the plan, to the extent the value of its claim exceeds its security.

To put a restructuring plan to creditors, a company must have (or substantially have):

paid all employee entitlements that are payable; and

given all returns, notices, statements, applications or other documents as required by taxation laws within the meaning of the *Income Tax Assessment Act 1997* (Cth).

The plan is put to creditors by the Restructuring Practitioner by sending a copy of it to as many creditors as reasonably practicable. Eligible creditors are asked to vote in writing on the restructuring plan and verify or dispute the company's assessment of the creditor's admissible debt or claim.

Creditors typically have 15 business days from the date of the proposed restructuring plan to vote. If a creditor disagrees with the company's assessment of its debt or claim, it should give notice of that disagreement to the Restructuring Practitioner within 5 business days of becoming aware of the restructuring plan. The Restructuring Practitioner must adjudicate on any dispute as to the value of a creditor's debt or claim and notify the company and the creditor of its recommendation (which may include varying the schedule of claims).

If, during the 15 day voting period, (which may be extended in some circumstances by the Restructuring Practitioner or the Court), a majority of creditors in value vote to accept the restructuring plan, the plan becomes binding.

An accepted restructuring plan becomes binding on the company, its officers, members and creditors to the extent of their admissible debts or claims (with some exceptions). If the restructuring plan terminates on being performed, the company can retain any property not required to be distributed to creditors under the restructuring plan. The company is then released from all admissible debts and claims that arose before the restructuring commenced.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Creditors' scheme of arrangement**

There is no insolvency requirement for a debtor company to pursue a creditors' scheme of arrangement.

**Receivership**

There is no insolvency requirement for the appointment of a receiver. A receiver can be appointed by the secured party over the property the subject of their security when permitted by the terms of that security. The appointment of a receiver will often follow payment default. It is also common for a receiver to be appointed if the debtor company it has security over goes into liquidation or voluntary administration.

**Liquidation**

Both solvent and insolvent companies can be placed into liquidation (albeit different kinds of liquidation).

A solvent company can be placed into liquidation by resolution of its shareholders and may also be wound up by court order in certain circumstances (for instance, where the relationship amongst the shareholders has entirely broken down).

An insolvent company can be placed into liquidation either voluntarily or involuntarily (i.e., by court order). See the discussion above under the heading 'What is the nature of the process' on these two different procedures.

**Voluntary administration/deed of company arrangement**

If the directors of the debtor company appoint an administrator, they must be of the opinion that the company is insolvent or likely to:

become insolvent at some future time. If a secured creditor appoints an administrator, this will be where their security has

become enforceable, often by reason of a payment default. If a liquidator appoints an administrator, it will be in an insolvent liquidation where creditor claims cannot be paid in full.

**Restructuring**

If the directors of the debtor company appoint a Restructuring Practitioner to administer a restructuring, they must be of the opinion that the company is insolvent or likely to become insolvent at some future time.

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Creditors' scheme of arrangement**

Broadly, only Australian incorporated companies or foreign companies that are registered in Australia may be the subject of a scheme of arrangement.

Separately, Australia is a party to the UNCITRAL Model Law on Cross-Border Insolvency ("**Model Law**"), which allows for insolvency proceedings to be classified as a "foreign non-main proceeding" or a "foreign main proceeding." We discuss this in the question "Has the UNCITRAL Model Law been adopted?" under the section "Effect of process" in connection with cross-border situations.

**Receivership**

No. Any corporation (domestic or foreign) can have its Australian assets placed into Australian-regulated receivership.

Separately, Australia is a party to the Model Law, which allows for insolvency proceedings to be classified as a "foreign non-main proceeding" or a "foreign main proceeding." We discuss this in the question "Has the UNCITRAL Model Law been adopted?" under the section "Effect of process" in connection with cross-border situations.

**Liquidation**

No, but (broadly speaking) only Australian incorporated companies or foreign companies registered or conducting business in Australia may be placed into Australian liquidation.

Australia is a party to the Model Law, which allows for insolvency proceedings to be classified as a "foreign non-main proceeding" or a "foreign main proceeding." We discuss this in the question "Has the UNCITRAL Model Law been adopted?" under the section "Effect of process" in connection with cross-border situations.

**Voluntary administration/deed of company arrangement**

No, but only Australian incorporated companies may be placed into Australian voluntary administration.

Separately, Australia is a party to the Model Law, which allows for insolvency proceedings to be classified as a "foreign non-main proceeding" or a "foreign main proceeding." We discuss this in the question "Has the UNCITRAL Model Law been adopted?" under the section "Effect of process" in connection with cross-border situations.

**Restructuring**

No, but only Australian incorporated companies may be placed into Restructuring.

Separately, Australia is a party to the Model Law, which allows for insolvency proceedings to be classified as a "foreign non-main proceeding" or a "foreign main proceeding." We discuss this in the question "Has the UNCITRAL Model Law been adopted?" under the section "Effect of process" in connection with cross-border situations.

## Is restructuring of both secured and unsecured claims possible?

**Creditors' scheme of arrangement**

Yes. A creditors' scheme of arrangement is able to deal with both secured and unsecured claims.

**Receivership**

No. Receivers only deal with the secured claims of the secured creditor who appointed them (although many continue to transact with certain unsecured creditors as part of the ongoing conduct of the company's business in receivership). However, a restructure of both secured and unsecured debt of a company can be undertaken by a receivership in combination with a contemporaneous voluntary administration.

**Liquidation**

Broadly, no.

A liquidation of a company is a terminal process that does not allow for restructuring of secured and unsecured claims. That said, a liquidator may take steps to put in place a scheme of arrangement or compromise in relation to some or all of the claims against the insolvent company (which might provide for a restructuring of either secured or unsecured claims). A liquidator can also appoint an administrator to the company with a view to restructuring. However, a DOCA will only bind a secured creditor in respect of the property subject to their security to the extent that they vote in favor of it.

**Voluntary administration/deed of company arrangement**

Restructuring of both secured and unsecured claims can occur in the DOCA phase of the administration process.

However, a DOCA can only bind a secured creditor in respect of the property subject to their security to the extent that they vote in favor of it.

Because of this limitation on the DOCA procedure, a company seeking to restructure secured claims against it will often instead consider a scheme of arrangement (see separate discussion). Alternatively, it is possible to restructure both secure and unsecured debts with a contemporaneous receivership and voluntary administration.

**Restructuring**

Generally, no. Restructuring is focused on the debts of unsecured creditors but will apply to secured creditors only to the extent the value of their claim exceeds its security, or if they otherwise accept the proposal and it is expressed to bind them.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Creditors' scheme of arrangement**

Yes. In a creditors' scheme of arrangement, claims are compromised by class (e.g., senior secured creditors only, or particular types of unsecured creditor, such as insurance policyholders), and voting to approve a scheme of arrangement must also be by each affected class of creditor.

**Receivership**

No. Some recoveries from the realization of secured assets are not available to secured creditors in a receivership. These are touched on below.

**Liquidation**

Yes in respect of treatment in the liquidation, but generally no in respect of voting rights. Classifications of stakeholders, in terms of ranking for distributions from the liquidation estate, are (in very general terms) as follows:

Secured creditors (whose claims are first satisfied from the assets subject to their security)

Priority unsecured creditors (in particular, employee claims and also the costs and remuneration of the liquidator)

Ordinary unsecured creditors (e.g., trade creditors and also revenue authorities)

Shareholder claims are generally subordinated and payable only in the event of a surplus after all creditor and liquidator claims have been paid. Some recoveries from the realization of secured assets are not available for priority distribution to secured creditors in a liquidation. These are touched on below.

**Voluntary administration/deed of company arrangement**

No in respect of voting rights, but potentially yes in how claims are treated under a DOCA. In terms of assessing the merits of a DOCA that may be proposed as part of the process, a classification of creditors and shareholders is taken into account, being (in very general terms) as follows:

Secured creditors (whose claims are first satisfied from the assets subject to their security)

Priority unsecured creditors (in particular, employee claims and also the costs and remuneration of the administrator)

Ordinary unsecured creditors (e.g., trade creditors and also including revenue authorities)

Shareholder claims are generally subordinated and payable only in the event of a surplus after all creditor and liquidator claims have been paid. Some recoveries from the realization of secured assets are not available for priority distribution to secured creditors in a DOCA. These are touched on below.

**Restructuring**

No. Restructuring only applies to the claims of unsecured creditors because of the following:

The restructuring requires payments of all, or substantially all, priority unsecured creditors' (employees) debts prior to the commencement of the restructuring.

Secured creditors are only creditors to the extent the value of their claim exceeds its security (at which point they are unsecured creditors) or because they accept the restructuring plan.

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Creditors' scheme of arrangement**

No. However, certain companies (particularly publicly listed companies) and certain restructuring transactions (such as a debt-to-equity conversion) may indirectly require shareholder approval for particular aspects of the overall restructure, for instance, to approve a dilutive share issue for purposes of applicable listing rules or to waive the takeover/mandatory bid requirements of the Corporations Act.

**Receivership**

No

**Liquidation**

No

**Voluntary administration/deed of company arrangement**

No. However, shareholders will have a right to appear at any hearing to approve a transfer of the shares in the company to a third party pursuant to a DOCA, and approvals might be required for some transactions to be effected as part of an overall transaction involving a DOCA.

**Restructuring**

No

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Creditors' scheme of arrangement**

Yes.

In order for the creditors' scheme of arrangement to be approved — and so have a binding effect on dissenting creditors — greater than 50% of the scheme creditors present at the scheme meeting must vote in favor of the scheme, and this majority must also constitute at least 75% of the total claims and debt of the creditors present (in person or by proxy) and voting at the scheme meeting.

**Receivership**

N/A. The receiver only has the ability to deal with the property subject to the security of the secured creditor.

**Liquidation**

Yes. The liquidation procedure binds all creditors (except for secured creditors, who may still realize their security).

**Voluntary administration/deed of company arrangement**

Yes. A DOCA binds the company, its creditors, officers, shareholders and administrators; however, secured creditors (in respect of the assets subject to their security) can only be bound by a DOCA if they voted in favor of it (and otherwise remain free to enforce their security).

**Restructuring**

Yes. A restructuring binds the company, its creditors, officers, shareholders and the Restructuring Practitioner; however, secured creditors (in respect of the assets subject to their security) can only be bound by a restructuring plan if they voted in favor of it (and otherwise remain free to enforce their security).

# Commencing the Process

## Who can commence?

**Creditors' scheme of arrangement**

The company acting by its directors initiates the creditors' scheme of arrangement. This may be consequent to an agreement reached with some of the company's creditors.

**Receivership**

A secured creditor can appoint a receiver over the property subject to their security in order to discharge the outstanding debt. In limited circumstances, the court may appoint a receiver.

**Liquidation**

Voluntary liquidation can be commenced by a special resolution of the company's shareholders.

Also, as noted above, a creditors' voluntary liquidation is often commenced at the second meeting of creditors in the company's voluntary administration.

A creditor, director, shareholder, liquidator or ASIC can apply to a court to have a company placed into involuntary court-ordered liquidation.

**Voluntary administration/deed of company arrangement**

The directors of the company, a liquidator appointed to the company or a secured creditor with security over the whole or substantially the whole of the company's property that has become and remains enforceable can commence a voluntary administration of the company.

Once the company is in administration, a DOCA proposal can be made by any party interested in the company's rehabilitation (commonly a creditor, director or shareholder but also potentially a third party).

**Restructuring**

The directors of the company may appoint a Restructuring Practitioner. Once the company is under restructuring, the company can put a restructuring plan to its creditors.

## Is shareholder's consent required to commence proceeding?

**Creditors' scheme of arrangement**

No

**Receivership**

No

**Liquidation**

Shareholder consent is required if the liquidation is a voluntary liquidation (except for a voluntary liquidation commencing at the second meeting of creditors in a voluntary administration).

Shareholder consent is not required for an involuntary, court-ordered liquidation.

**Voluntary administration/deed of company arrangement**

No

**Restructuring**

No

## Is there an ability to consolidate group estates?

**Creditors' scheme of arrangement**

No. The creditors' scheme of arrangement can only apply to the assets of the entity of the creditors.

However, it is common for group companies to collectively propose interrelated schemes of arrangement in substantially identical terms. Also, it is common for a parent company to propose a scheme of arrangement that contains various releases of claims by affected creditors against the parent and its subsidiaries.

**Receivership**

No

**Liquidation**

Yes. Pooling orders can be sought by the liquidator of a group of companies in appropriate circumstances.

**Voluntary administration/deed of company arrangement**

Yes. Pooling arrangements may be implemented in a DOCA across a group of companies in appropriate circumstances.

**Restructuring**

No.

## Is there any court involvement?

**Creditors' scheme of arrangement**

Yes. There are two court hearings to effect a creditors' scheme of arrangement as follows.

**First Court Hearing**

The court may, if satisfied, make orders on the application of the company for the convening of meetings of the relevant class or classes of creditors for the purpose of considering the proposed creditors' scheme of arrangement ("**First Court Hearing**").

After the First Court Hearing, the company will facilitate the holding of the meeting or meetings ("**Scheme Meetings**") of the class or classes of relevant creditors, as the case may be, to vote on the proposed creditors' scheme of arrangement.

**Second Court Hearing**

Assuming the requisite creditor approvals are obtained at the Scheme Meetings (and other conditions precedent are satisfied), the court conducts a second hearing at which the court makes orders affecting the creditors' scheme of approval ("**Second Court Hearing**"). The Second Court Hearing involves (broadly speaking) the satisfaction of the technical requirements, including the voting thresholds and a consideration of the "fairness" of the creditors' scheme of arrangement.

**Receivership**

Usually, private receiverships will not have any court involvement. However, a receiver, like a liquidator and an administrator, can seek directions from the court and is subject to the supervision of the court. In addition, creditors and other persons aggrieved by any act, omission or decision of a receiver can appeal to the court.

**Liquidation**

An involuntary court-ordered liquidation is commenced by an order of the court and is then supervised by the court.

Voluntary liquidation is commenced without any court involvement.

In both involuntary and voluntary liquidations, the court has a range of powers in connection with a company's winding-up, and liquidators can seek directions from the court and are subject to the supervision of the court. Creditors and other persons aggrieved by any act, omission or decision of a liquidator (including the adjudication of their proof of debt) can appeal to the court to review such an act/omission/decision.

**Voluntary administration/deed of company arrangement**

The court has no required role in the appointment of a voluntary administrator or the conduct of a voluntary administration.

While it is entirely possible that the court will have no involvement in a voluntary administration, it is common for the court to be asked to extend the period in which the second meeting of creditors must be convened on the application of the administrator. This extension is sometimes sought and granted on more than one occasion during a voluntary administration.

However, the court has very broad powers to make orders in connection with administrations, and an administrator can seek directions from the court and is subject to the supervision of the court. Creditors and other persons aggrieved by any act, omission or decision of an administrator or a deed administrator (including the adjudication of their proof of debt) can appeal to the court to review such an act/omission/decision.

**Restructuring**

The court has no required role in the commencement of a restructuring, or in the conduct of the restructuring or any restructuring plan.

However, the court has very broad powers to make orders in connection with a restructuring on application by a Restructuring Practitioner, director or creditor.

## Who manages the debtor?

**Creditors' scheme of arrangement**

A company proposing a scheme of arrangement continues under the control of its board of directors — in this sense, it is the only "debtor in possession" corporation insolvency procedure available in Australia.

It is worth noting that in some instances, a company already in voluntary administration or liquidation proposes a scheme of arrangement. In these instances, the administrator or liquidator will have control of the company to the exclusion of the directors.

**Receivership**

The receiver has the management of the company's assets subject to the appointing secured creditor's security to which they have been appointed — this is usually the entire assets and undertaking of the company (in which case the receiver will have full management control of the company).

It will often be the case that voluntary administration or liquidation takes place concurrently with receivership, under the control of a separate administrator or liquidator.

In the case of receivership that takes place concurrently with an administration, the receiver will effectively have the benefit of some of the administration moratorium provisions (such as that any landlord of premises occupied by the company cannot take possession of the premises during the period of the administration without the consent of the administrator or the leave of the court), the receiver being personally liable for post-appointment rent if they elect to cause the company to remain in possession.

In a concurrent receivership with a voluntary administration, DOCA or winding-up, the receiver will generally have control of the assets of the company and be responsible for trading on its business.

Accordingly, dealings in relation to operational matters (such as continued supply to the company and the continued performance by the company of its contractual obligations) or in connection with the sale of assets are appropriately conducted by the receiver.

Generally speaking, the claims of unsecured creditors are progressed by way of the administration, DOCA or winding-up. Meetings of creditors will be held by the administrator, deed administrator or liquidator, and accordingly proofs of debt and proxies are lodged with the administrator, deed administrator or liquidator, who will adjudicate on creditors' claims.

**Liquidation**

The liquidator manages the debtor company from the time of the appointment, with director and shareholder power superseded.

**Voluntary administration/deed of company arrangement**

The administrator manages the debtor company during the voluntary administration (with director and shareholder powers superseded).

If a DOCA is entered into, control of the debtor company usually returns to the directors and the DOCA administrator is responsible for effectuating the terms of the DOCA (e.g., paying dividends to creditors).

**Restructuring**

The directors continue to manage the company's affairs and have permission to cause the company to enter into transactions or dealings in the ordinary course of the company's business or otherwise, with the consent of the Restructuring Practitioner.

## What is level of disclosure of process to voting creditors?

**Creditors' scheme of arrangement**

A creditors' scheme of arrangement requires significant disclosures to be made to the creditors to allow informed voting at the Scheme Meetings.

Disclosures to creditors are made predominantly through a very detailed scheme booklet, which sets out the proposed scheme, identifies the benefits of implementation and the associated risks and includes current audited accounts for the company.

This information is first reviewed by both ASIC and by the court (at the First Court Hearing mentioned above), before going to affected creditors.

**Receivership**

N/A

**Liquidation**

There are various statutory reports to creditors in connection with the liquidation generally. If creditors are asked to approve particular steps in liquidation, such as the liquidator's remuneration or entry by the company into particular agreements, appropriate disclosure is made to creditors.

**Voluntary administration/deed of company arrangement**

The voluntary administrator must give two reports to creditors. One must be given prior to the first meeting of creditors. This report is very basic. It advises creditors of the following:

The appointment of the voluntary administrator

The date, time and place of the first meeting of creditors

The administrator's declaration of independence and relevant relationships (DIRRI)

The remuneration estimated to be charged for the administration

The second report to creditors is given five business days before the second meeting of creditors. In convening the second meeting, the administrator must provide creditors with a report ("**Repor**t"), which accomplishes the following:

Discusses the company's business, property, affairs and financial circumstances and sets out the details of any proposed DOCA to be put to creditors.

Provides the administrator's opinion as to whether it is in the interests of the creditors for the company to execute any DOCA that has been proposed, for the administration to end (and the company is returned to the control of its directors) or for the company to be wound up, and the reasons for that opinion.

The Report will, where a DOCA is proposed, consider the likely returns to creditors in a winding-up compared to the likely returns under the proposed DOCA, both as to quantum and likely timing. This will involve a consideration of what liquidator's recoveries may be available if the company is wound up, as these recoveries are not available in a DOCA.

**Restructuring**

Creditors are provided with a proposed restructuring plan, which must accomplish the following:

Identify what company property is to be dealt with under the restructuring plan and how that property will be dealt with.

Provide for the remuneration of the Restructuring Practitioner for the restructuring plan.

Be accompanied by a restructuring proposal statement, which must include a schedule of debts and claims for each of the creditors.

Specify the date on which the restructuring plan was executed.

The Restructuring Practitioner must also give creditors a declaration which states whether, or whether not, the Restructuring Practitioner believes the following on reasonable grounds:

The company meets the eligibility criteria to undertake a restructuring.

The restructuring proposal statement has set out all the information required.

If the restructuring plan is made, the company is likely to be able to discharge the obligations created by the restructuring plan as and when they become due and payable;

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Creditors' scheme of arrangement**

Australia has special regulations on the financial distress of banks (under the Banking Act 1959 (Cth)) and insurance companies (under the Insurance Act 1973 (Cth)).

**Receivership**

Australia has special regulations on the financial distress of banks (under the Banking Act 1959 (Cth)) and insurance companies (under the Insurance Act 1973 (Cth)).

**Liquidation**

Australia has special regulations on the financial distress of banks (under the Banking Act 1959 (Cth)) and insurance companies (under the Insurance Act 1973 (Cth)).

**Voluntary administration/deed of company arrangement**

Australia has special regulations on the financial distress of banks (under the Banking Act 1959 (Cth)) and insurance companies (under the Insurance Act 1973 (Cth)).

**Restructuring**

Australia has special regulations on the financial distress of banks (under the Banking Act 1959 (Cth)) and insurance companies (under the Insurance Act 1973 (Cth)).

## How long does it generally take for a creditor to commence the procedure?

**Creditors' scheme of arrangement**

N/A as only the company can apply for a creditors' scheme of arrangement.

**Receivership**

Only a secured creditor can commence a receivership, and that can be done relatively quickly after an event of default. An ordinary unsecured creditor remains free to seek to involuntarily liquidate a company that is in receivership (assuming that the company is not already in liquidation or voluntary administration). Receivership does not impose any moratorium on such efforts.

**Liquidation**

In the case of an involuntary, court-ordered liquidation, the process of having a winding-up application determined takes around three months (assuming that the company does not actively resist or delay the steps taken to have the company placed into liquidation).

**Voluntary administration/deed of company arrangement**

A secured creditor with security over the whole or substantially the whole of the company's property that has become and remains enforceable can appoint an administrator quickly. This is also the case with a liquidator appointing an administrator unless the liquidator is seeking to appoint themselves administrator, in which case a slightly longer process is involved.

Unsecured creditors cannot place a company in voluntary administration.

**Restructuring**

N/A.

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Creditors' scheme of arrangement**

Yes, the company continues under the control of its board of directors.

 If formal voluntary administration or liquidation processes have already commenced, then the administrator or liquidator will remain in control during the process to the exclusion of directors.

**Receivership**

In relation to the property over which the secured creditor appoints the receiver, the debtor will no longer have management control of that property.

Management of the debtor does continue in control over any remaining property of the debtor and otherwise (provided the receivership is not ongoing with a concurrent voluntary administration or liquidation, which is commonplace).

In instances of concurrent voluntary administration/liquidation and receivership, the management of the debtor will cease to be in control of the debtor (and will be held by the receiver and administrator/liquidator, as explained above).

**Liquidation**

No. Control of the debtor company passes to the liquidator.

**Voluntary administration/deed of company arrangement**

No. Control of the debtor company passes to the administrator.

**Restructuring**

Yes. The company continues under the control of its directors.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Creditors' scheme of arrangement**

While there is no automatic stay/moratorium on enforcement or involuntary liquidation against the company while a creditors' scheme of arrangement is being proposed, the debtor may apply to the court for a stay of such proceedings.

There is now also, in broad terms, a general moratorium on contract counterparties seeking to terminate contracts with the company on the basis of the company proposing a creditors' scheme of arrangement.

The relevant legislation, which provides for stays involving steps taken against Australian incorporated companies, is expressed to have an extraterritorial effect.

**Receivership**

There is no moratorium or stay on the enforcement of claims against the company in receivership.

There is now also, in broad terms, a general moratorium on contract counterparties seeking to terminate contracts with the company on the basis of the company having been placed into receivership if such receivership is over effectively the entirety of the company's assets and undertaking (which is not always the case).

The relevant legislation, which provides for stays involving steps taken against Australian incorporated companies, is expressed to have an extraterritorial effect.

**Liquidation**

Following the appointment of a liquidator, no action or other civil proceeding can be proceeded with or commenced against the debtor company except by leave of the court and subject to any terms imposed by the court. This stay applies to Australian courts only.

**Voluntary administration/deed of company arrangement**

During the administration period:

Creditors, including some secured creditors, are 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 or is in possession of the company — including leased premises and goods subject to retention of title or Purchase Money Security Interest (PMSI) terms — are prohibited from seizing or reclaiming property (notwithstanding that they may have contractual rights to do so); in each case without the consent of the administrator or order of the court. The administrator has personal liability in respect of services rendered, goods bought, property leased or occupied, and funds borrowed during the administration.

The main exceptions to the moratorium are:

in relation to perishable goods

where enforcement has commenced prior to the appointment of the administrator; or where a secured creditor who has a security interest over the whole or substantially the whole of the company's property enforces its security interest within the "decision period," is 13 business days from the giving of notice by the administrator of their appointment or from the commencement of the administration or such further time as may be permitted by order of the court or consent of the administrator.

The administrator is not able to deal with property subject to a security interest (including property that is the subject of retention of title or PMSI terms) unless in the ordinary course of business or with the consent of the secured creditor/owner or the leave of the court.

Where the administrator uses retention of title or PMSI property in the ordinary course of business, the Corporations Act requires the administrator to act reasonably in exercising any rights to dispose of that property and to apply the proceeds of sale in a particular manner according to the statutory priority of interests in that property.

In addition, guarantees granted by directors of the company cannot be enforced during the administration period.

Further, a proceeding "in a court" (excepting a criminal proceeding) against the debtor company or in relation to any of its property cannot be begun or proceeded with except with the consent of the administrator or leave of the court.

A DOCA will generally include a moratorium on claims of creditors that are subject to the DOCA being pursued other than by the DOCA process.

In broad terms, there is now a general moratorium on contract counterparties seeking to terminate contracts with the company based on the basis of the company being in voluntary administration.

The relevant legislation, which provides for stays involving steps taken against Australian incorporated companies, is expressed to have an extraterritorial effect.

**Restructuring**

During the period of the restructuring:

Creditors, including some secured creditors, are 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 or is in possession of the company — including leased premises and goods subject to retention of title or Purchase Money Security Interest (PMSI) terms — are prohibited from seizing or reclaiming property (notwithstanding that they may have contractual rights to do so); in each case without the consent of the Restructuring Practitioner or order of the court.

The main exceptions to the moratorium are:

in relation to perishable goods

where enforcement has commenced prior to the appointment of the administrator; or where a secured creditor who has a security interest over the whole or substantially the whole of the company's property enforces its security interest within the "decision period," is 13 business days from the giving of notice by the administrator of their appointment or from the commencement of the administration, or such further time as may be permitted by order of the court or consent of the administrator.

The administrator is not able to deal with property subject to a security interest (including property that is the subject of retention of title or PMSI terms) unless in the ordinary course of business or with the consent of the secured creditor/owner or the leave of the court.

In addition, guarantees granted by directors of the company cannot be enforced during the administration period.

Further, a proceeding "in a court" (excepting a criminal proceeding) against the debtor company or in relation to any of its property cannot be begun or proceeded with except with the consent of the administrator or leave of the court.

A restructuring plan is subject to a moratorium on claims of creditors being pursued other than by the restructuring plan process.

There is also, in broad terms, a general moratorium on contract counterparties seeking to terminate contracts with the company on the basis of the company being in voluntary administration.

The relevant legislation, which provides for stays involving steps taken against Australian incorporated companies, is expressed to have an extraterritorial effect.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Creditors' scheme of arrangement**

No.

**Receivership**

No.

**Liquidation**

No.

**Voluntary administration/deed of company arrangement**

No. However, an administrator is personally liable for any borrowings in the administration and enjoys an indemnity out of the assets of the company in respect of such liability, supported by a lien over those assets. This potentially enables the administrator to borrow funds with a superpriority, although subject to the rights of existing secured creditors.

**Restructuring**

No

## Can procedure be used to implement a debt-to-equity swap?

**Creditors' scheme of arrangement**

Yes. Although not expressly part of the scheme of arrangement legislation, schemes involving debt-to-equity swaps are common.

**Receivership**

No.

**Liquidation**

Yes, in certain, very limited circumstances (although this is very rarely used).

**Voluntary administration/deed of company arrangement**

Yes, through a DOCA (although there are no special statutory provisions for a debt-to-equity swap).

**Restructuring**

While the restructuring regime contains some of the mechanisms used in a voluntary administration to facilitate a debt-to-equity swap, the process is new. The extent to which it could be used in this way is yet to be tested.

## Are third party releases available?

**Creditors' scheme of arrangement**

Yes, schemes can be used to release creditors' claims against both the company as well as third parties.

**Receivership**

No

**Liquidation**

No

**Voluntary administration/deed of company arrangement**

No.

**Restructuring**

No.

## Are the proceedings recognised abroad?

**Creditors' scheme of arrangement**

Yes, under the Model Law.

**Receivership**

No (although receivers may be recognized abroad at general law, as being effectively appointed agents of the company).

**Liquidation**

Yes, under the Model Law.

**Voluntary administration/deed of company arrangement**

Yes, under the Model Law.

**Restructuring**

The regime is new, and the extent to which it will be recognized is yet to be tested. However, in theory, it should be capable of being recognized.

## Has the UNCITRAL Model Law been adopted?

**Creditors' scheme of arrangement**

Yes. Australia adopted the Model Law in 2008 (enacted in the Cross-Border Insolvency Act 2008 (Cth)).

**Receivership**

Yes. Australia adopted the Model Law in 2008 (enacted in the Cross-Border Insolvency Act 2008 (Cth)).

**Liquidation**

Yes. Australia adopted the Model Law in 2008 (enacted in the Cross-Border Insolvency Act 2008 (Cth)).

**Voluntary administration/deed of company arrangement**

Yes. Australia adopted the Model Law in 2008 (enacted in the Cross-Border Insolvency Act 2008 (Cth)).

**Restructuring**

Yes. Australia adopted the Model Law in 2008 (enacted in the Cross-Border Insolvency Act 2008 (Cth)).

## Can a debtor continue to carry on business during insolvency proceedings?

**Creditors' scheme of arrangement**

The debtor may and usually will continue to carry on business under a creditors' scheme of the arrangement, provided no formal insolvency proceedings are on foot.

**Receivership**

The receiver often carries on the business to the extent necessary to realize the secured assets.

**Liquidation**

A liquidator will only carry on a company's business so far as necessary for its sale or winding-up.

**Voluntary administration/deed of company arrangement**

The administrator continues to trade the company's business during the voluntary administration unless the administrator determines that it is not profitable or practicable (given available funding) to do so, in which case the administrator may shut down the business or parts of it during the voluntary administration phase.

**Restructuring**

Yes, Restructuring is a debtor-in-possession process.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Creditors' scheme of arrangement**

Although insolvent trading claims can only be pursued by a liquidator and not in a creditors' scheme of the arrangement, the Australian insolvent trading prohibition drives director behavior when a company is approaching insolvency.

Under the Corporations Act, directors have a positive duty to prevent the company from trading while insolvent. If the company incurs a debt while insolvent or becomes insolvent as a result of incurring that debt, and a director at the time the debt is incurred is aware that there are grounds for suspecting the company is insolvent, or a reasonable person in a like position in the company's circumstances would be so aware, that director will have breached their duty by failing to prevent the company from incurring that debt. Insolvent trading can also be a crime where dishonesty is involved.

There are only limited defenses available to an insolvent trading claim, including that, when the debt was incurred, the director:

Had reasonable grounds to expect, and did expect, that the company was solvent and would remain solvent

Had reasonable grounds to believe that a competent and reliable person was fulfilling their obligation to provide adequate information as to whether the company was solvent and would remain solvent, and expected, on the basis of this information, that the company was solvent and would remain solvent

Did not take part in the management of the company

Took all reasonable steps to prevent the company from incurring the debt (including whether the person took steps to appoint an administrator to the company)

Is able to rely on the safe harbor provision, section 588 GA of the Corporations Act

The debt was incurred between 25 March 2020 and 24 September 2020 in the ordinary course of the company's business.

**Receivership**

Although insolvent trading claims can only be pursued by a liquidator and not a receiver, the Australian insolvent trading prohibition drives director behavior when a company is approaching insolvency.

Under the Corporations Act, directors have a positive duty to prevent the company from trading while insolvent.

If the company incurs a debt while insolvent or becomes insolvent as a result of incurring that debt, and a director at the time the debt is incurred is aware that there are grounds for suspecting the company is insolvent, or a reasonable person in a like position in the company's circumstances would be so aware, that director will have breached their duty by failing to prevent the company from incurring that debt. Insolvent trading can also be a crime where dishonesty is involved.

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Had reasonable grounds to believe that a competent and reliable person was fulfilling their obligation to provide adequate information as to whether the company was solvent and would remain solvent, and expected, on the basis of this information, that the company was solvent and would remain solvent

Did not take part in the management of the company

Took all reasonable steps to prevent the company from incurring the debt (including whether the person took steps to appoint an administrator to the company)

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**Liquidation**

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If the company incurs a debt while insolvent or becomes insolvent as a result of incurring that debt, and a director at the time the debt is incurred is aware that there are grounds for suspecting the company is insolvent, or a reasonable person in a like position in the company's circumstances would be so aware, that director will have breached their duty by failing to prevent the company from incurring that debt.

Insolvent trading can also be a crime where dishonesty is involved.

There are only limited defenses available to an insolvent trading claim, including that, when the debt was incurred, the director:

Had reasonable grounds to expect, and did expect, that the company was solvent and would remain solvent

Had reasonable grounds to believe that a competent and reliable person was fulfilling their obligation to provide adequate information as to whether the company was solvent and would remain solvent, and expected, on the basis of this information, that the company was solvent and would remain solvent

Did not take part in the management of the company

Took all reasonable steps to prevent the company from incurring the debt (including whether the person took steps to appoint an administrator to the company)

Is able to rely on the safe harbor provision, section 588 GA of the Corporations Act

The debt was incurred between 25 March 2020 and 24 September 2020 in the ordinary course of the company's business.

If a director has been found to have breached the duty to prevent insolvent trading, the liquidator may recover from the director, as a debt due to the company, the amount of any loss or damage suffered by an unsecured creditor whose debt was incurred while the company was insolvent. In limited circumstances, the affected creditor can sue for recovery of its loss and damage directly.

**Voluntary administration/deed of company arrangement**

Although insolvent trading claims can only be pursued by a liquidator and not an administrator or deed administrator, the Australian insolvent trading prohibition drives director behavior when a company is approaching insolvency.

Under the Corporations Act, directors have a positive duty to prevent the company from trading while insolvent.

If the company incurs a debt while insolvent or becomes insolvent as a result of incurring that debt, and a director at the time the debt is incurred is aware that there are grounds for suspecting the company is insolvent, or a reasonable person in a like position in the company's circumstances would be so aware, that director will have breached their duty by failing to prevent the company from incurring that debt.

Insolvent trading can also be a crime where dishonesty is involved.

There are only limited defenses available to an insolvent trading claim, including that, when the debt was incurred, the director:

Had reasonable grounds to expect, and did expect, that the company was solvent and would remain solvent

Had reasonable grounds to believe that a competent and reliable person was fulfilling their obligation to provide adequate information as to whether the company was solvent and would remain solvent, and expected, on the basis of this information, that the company was solvent and would remain solvent

Did not take part in the management of the company

Took all reasonable steps to prevent the company from incurring the debt (including whether the person took steps to appoint an administrator to the company)

Is able to rely on the safe harbor provision, section 588 GA of the Corporations Act

The debt was incurred between 25 March 2020 and 24 September 2020 in the ordinary course of the company's business.

The risk of insolvent trading liability often drives directors to place a company into voluntary administration promptly, and the risk of such liability in a liquidation scenario often encourages directors to propose a DOCA for the company (in order to avoid a liquidator being appointed who may then pursue insolvent trading claims).

**Restructuring**

Although insolvent trading claims can only be pursued by a liquidator and not an administrator or deed administrator, the Australian insolvent trading prohibition drives director behavior when a company is approaching insolvency.

Under the Corporations Act, directors have a positive duty to prevent the company from trading while insolvent.

If the company incurs a debt while insolvent or becomes insolvent as a result of incurring that debt, and a director at the time the debt is incurred is aware that there are grounds for suspecting the company is insolvent, or a reasonable person in a like position in the company's circumstances would be so aware, that director will have breached their duty by failing to prevent the company from incurring that debt.

Insolvent trading can also be a crime when dishonesty is involved.

There are only limited defenses available to an insolvent trading claim, including that, when the debt was incurred, the director:

Had reasonable grounds to expect, and did expect, that the company was solvent and would remain solvent

Had reasonable grounds to believe that a competent and reliable person was fulfilling their obligation to provide adequate information as to whether the company was solvent and would remain solvent, and expected, on the basis of this information, that the company was solvent and would remain solvent

Did not take part in the management of the company

Took all reasonable steps to prevent the company from incurring the debt (including whether the person took steps to appoint an administrator to the company)

Is able to rely on the safe harbor provision, section 588 GA of the Corporations Act

The debt was incurred between 25 March 2020 and 24 September 2020 in the ordinary course of the company's business.

The risk of insolvent trading may be a reason for directors to commence a restructuring. A director's duty to prevent insolvent trading does not apply in respect of debts incurred during the restructuring phase and in the ordinary course of the company's business.

## What is the order of priority of claims?

**Creditors' scheme of arrangement**

N/A — A creditors' scheme of arrangement will only apply to the class or classes of creditors intended to be impacted by the scheme (which is often limited to secured creditors or particular classes of unsecured creditors).

**Receivership**

A receiver only attends to payment of the secured creditor's debt from the proceeds of realization of the secured assets (after paying any prior-ranking claims), returning any surplus to the company, and is not responsible for dealing with the claims of unsecured creditors. It is worth noting that the claims of a secured creditor to assets subject to a "circulating security interest" — usually cash, receivables, inventory and similar assets — are statutorily subordinated to specified employee claims that qualify for priority in a winding-up, being wages and superannuation, leave and redundancy entitlements.

**Liquidation**

Specified debts and claims will take priority over the claims of unsecured creditors in liquidation, being in general terms:

Expenses incurred by a liquidator and any prior administrator in preserving and realizing the property of the company

The costs and expenses of obtaining an order for liquidation; and priority employee entitlements

All other unsecured debts rank equally according to the pari passu principle, and if the property of the company is insufficient to meet them in full, they must be paid pro-rata.

Secured creditors are entitled to enforce their security interest during the liquidation, assuming it is not void as against the liquidator. However, the secured creditor's claim to assets subject to a circulating security interest — usually cash, receivables, inventory and similar assets — is statutorily subordinated to specified employee claims that qualify for priority in a winding-up, being wages and superannuation, leave and redundancy entitlements.

**Voluntary administration/deed of company arrangement**

Adjudication and payment of creditors do not form part of the voluntary administration process.

If a company enters into a DOCA, generally, the liquidation priorities are respected, although it is possible to discriminate between creditors on a rational basis, such as in favor of "continuing" creditors. However, a DOCA must give employee entitlements the statutory priority to which they would be entitled in winding-up out of assets of the company coming under the control of the deed administrator unless employee creditors vote to modify this priority at a separate meeting of the employees convened under section 444DA of the Corporations Act. Priority employee entitlements include wages and superannuation, leave and redundancy entitlements.

**Restructuring**

There is no priority of payments to particular creditors under a Restructuring Plan. Only unsecured creditors are eligible for receivable paid on a pari passu basis.

Secured creditors only participate to the extent the value of their claim exceeds their security, at which point they become unsecured creditors. Employee entitlements must be fully paid as a condition of putting the Restructuring Plan to creditors.

## Do pension liabilities have any priority over other unsecured claims?

**Creditors' scheme of arrangement**

No

**Receivership**

No

**Liquidation**

No

**Voluntary administration/deed of company arrangement**

No.

**Restructuring.**

No.

## Is it possible to challenge prior transactions?

**Creditors' scheme of arrangement**

No.

**Receivership**

No.

**Liquidation**

The liquidator's primary tools for recovery are voidable transactions (which include unfair preferences and uncommercial transactions) and insolvent trading claims (touched on above). Other courses of action are available to liquidators, including in relation to unfair loans and unreasonable director-related transactions that are beyond the scope of this document.

**Unfair preferences**

Unfair preferences are the most common type of liquidator recovery.

An unfair preference is a payment 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 has been preferred over other unsecured creditors (i.e., the creditor has received more than if they had proved in the winding-up in respect of the debt and participated pari passu for dividend).

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 potential defenses to an unfair preference claim, most commonly if the creditor can establish the following:

It became a party to the transaction in good faith.

It had no reasonable grounds for suspecting that the company was insolvent at the time or would become insolvent as a result of the transaction and a reasonable person in their circumstances would have had no such grounds for so suspecting.

It has provided valuable consideration or changed its position in reliance on the transaction.

**Uncommercial transaction**

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. The test for what constitutes an uncommercial transaction has been expressed as "a bargain of such magnitude that it could not be explained by normal commercial practice." Although the quintessential uncommercial transaction is a disposition of company property at less than its value  (such as in phoenix company conduct), the concept is not so limited.

There are potential defenses to an uncommercial transaction claim, most commonly if the defendant can establish the following:

It became a party to the transaction in good faith.

It had no reasonable grounds for suspecting that the company was insolvent at the time or would become insolvent as a result of the transaction and a reasonable person in their circumstances would have had no such grounds for so suspecting.

It provided valuable consideration or changed their position in reliance on the transaction.

This is known as the relation-back day. It is important to note that depending on the circumstances of the winding-up and its commencement, the relation-back day calculation can change. Section 91 of the Corporations Act comprehensively outlines the process for calculating the relation-back day. An explanation of each of these circumstances is beyond the scope of this document.

**Voluntary administration/deed of company arrangement**

No. Voluntary administration and a DOCA, being rehabilitation procedures, are not concerned with challenges to prior transactions. However, the report provided to creditors in relation to options for the company's future provided prior to the second meeting of creditors in an administration will include a preliminary assessment of the availability of recovery action in relation to prior transactions — this assists with assessing the merits of a DOCA proposal in respect of the debtor company against proceeding into liquidation.

**Restructuring**

No. Restructuring and a restructuring plan are rehabilitation procedures and are not concerned with challenges to prior transactions.

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