

SCAFFOLD – INSOLVENCY

Step 0: Is insolvency relevant?

- Yes
 - Bankruptcy: creditor's petition (s52), avoidance provisions (Part VI, Div 3)
 - Winding up applications (Pt 5.4)
 - Appointment of voluntary administrators (s436A)
 - Initiation of small business restructuring (Pt 5.3B)
 - Recovery proceedings (Corporate):
 - Voidable transactions (Pt 5.7B Div 2)
 - Insolvent trading (Pt 5.7B Div 3)

Step 1: Is it personal or corporate insolvency? NB: the time pt is “as and when they become due and payable”

- [A]: Personal Insolvency
 - Rule: The BA defines solvency as when one is able to pay all of one's debt, as and when they become due and payable (s5(2))
 - A person who is not solvent is insolvent (s5(3))
- **[B]: Corporate**
 - Rule: CA defines insolvency as when one is UNABLE to pay all of its debt as and when they become due and payable (CA s95A(1)), solvency is when one is not insolvent (CA s95A(2))
 - Deemed insolvency (s588E)
 - Failed to keep adequate books and records in relation to a period (s588E(4)(a))
 - Failed to retain financial records in relation to a period of 7 years (s588E(4)(b))

Step 2: What is the test and what are the indicators of insolvency?

- Rule: Practical ability or inability to pay debts as and when they **become due and payable** (*Lewis v Doran*). Cash flow test of balance sheet test (*Sth Cross Interiors v DCT*; *Rees*; *Hall v Poolman*).
 - **Borrowed funds**: The statutory focus is on “**solvency and not liquidity**”, therefore should consider the terms of credit or financial support available to the respondent with which to defray debts owed to creditors (*Brooks v Heritage Hotel Adelaide P/L* (1996) 20 ACSR 61)
 - Needs to take into account the commercial realities of the debtor's situation – the resources that are available to the company to meet its liabilities as they fall due, if not by cash, then by way of sale or borrowing upon security within an acceptable time frame (*Sandell v Porter*)
- Not insolvent
 - Temporary lack of liquidity of endemic shortage of working capital (*Rees v Bank of NSW*)
 - Able to sell assets to realise capital to pay debt within reasonable amount of time (*Hall v Poolman*)
- Due and payable
 - Rule: Depends on circumstances and nature of the company's business (*Lewis v Doran*; *Master Offshore Ltd*)
 - Examples
 - Reasonably immediate future (*Bank of Australasia v Hall* (1907) 4 CLR 1514)
 - A relatively short time (*Sandell v Porter*)
 - 90 days (*Hall v Poolman*)
 - 12 months (*Bell*)
 - 18 months (*Re Cheyne Finance*)
 - Insurance co may be different → 7 years (*Dominions*) because their liabilities may be extremely long-tail under the policies
 - Creditor delays not relevant, date per contract is the reference point unless binding agreement to extend (*Sth Cross Interiors* [2001] NSWSC 621; *Powell v Fryer*)
- Indicators (*Lewis v Doran* at [75]; *ASIC v Plymin* [386]):
 - History/continuing losses
 - Liquidity ratios below 1
 - Current assets < current liabilities (**Centro**)
 - Overdue taxes/tax debts (**Re Balmz**)
 - Inability to finance
 - Bank requests to reduce overdraft
 - Changing supply terms to Cash on Delivery or demanding special payment arrangements
 - Eg. supplier change of terms indicate inability to pay invoices
 - Paying a rounded sum to satisfy all debts

- Dishonoured cheques
- Enforcement actions taken by creditors → statutory demand
- Inability to produce timely and accurate financial information
- Group support from single enterprise groups (*Hall v Poolman*)
 - Should take the form of binding or firm arrangements and NB: director duties to consider each Co separately
- Director and shareholder support (loans etc) (*Westgem*)
- Prospective insolvency
 - Rule: Whether there is a current ability to pay all debts as and when they become due and payable → “future debts” included (*Doran; Wright*)
- Retrospective insolvency

PPSA

- **Relevance as to secured creditors for the purposes of LIQ/VA/RECEIVERSHIP/etc**
 - “**Secured creditor**”: is defined as a creditor of a corporation if the debt owing to the creditor is secured by a security interest or a secured creditor of the CCIV if the debt owing to the creditor is, to any extent, a liability of the sub-fund (**CA s51E**)
- **Does it come within PPSA?**

Summary:

- [a] Does the good or financial property fall within the PPSA?
- [b] Identify the parties and property
- [c] Is the security interest captured by the PPSA?
- [d] Outcome

[a] Does the good or financial property fall within the PPSA?

- **PPSA s6(1)**: goods or property must be located in Australia OR the grantor is an Australian entity
- **PPSA s8**: some property is excepted: [main being interests in land (e) and fixtures (j)]
 - Including:
 - s8(1)(a): bill of lading (unless expressed to create a security interest)
 - **s8(1)(b): lien, charge, or any other interest in personal property**, that is created, arises or is provided for under a law of the Commonwealth [**Statute**]
 - **s8(1)(c): a lien, charge, or any other interest** in personal property, that is created, arises or is provided for by operation of the general law; [**General Law**]
 - **s8(1)(d): rights of set-off or right of combination of accounts**
 - **s8(1)(f)(i): Interests in land** [land does not include fixture]
 - ...
 - **s8(1)(j): an interest in a fixture**
 - **s8(1)(h) Quistclose trusts**
 - **NB: S73 → Priority interest by LAW > another security interest**
 - Interest created/arose by Statute or general law, re provision of goods or services in the ordinary course of business of the person holding the priority interest AND no other Statute provide for its priority, priority party acquired the interest without actual knowledge that this is a breach of the security agreement that provides for the security interest.
 - Applies to s8(1)(b),(c) liens ... despite s8 (s8(2) PPSA).

[b] Identify the parties and property

- **Grantor** – grants a security interest under an agreement
- **Secured party** – holds a security interest to ensure grantor repays money or meets obligations
- **Collateral** – property to which a security interest is attached
 - **PPSA s 10: Personal Property means** property (including a licence) other than:
 - Land
 - Right, entitlement or authority that is: Granted by law and declared not to be personal property for the purposes of the PPSA

[c] Is the security interest captured by the PPSA?

- **Two types of security interests under PPSA (not mutually exclusive)**
 1. An ‘In substance’ security interest (**s12(1)**)
 2. A ‘Deemed’ security interest (**s12(3)**)

Step A: s12(1) requirements – RULE: Is the interest a security interest for the purposes of s12(1): *A security interest means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).*

- PPSA s10 “value” is consideration sufficient to support a contract
- **Language and Effect of the agreement** (does it use language of lease or bailment?)
 - Bailment: delivery of exclusive possession with an obligation to redeliver (to secure an interest – no transfer of legal title, but an obligation to redeliver the property when loan repaid, etc and also a right to realise the property for failure to meet obligations, e.g. repayment of loan).
 - Lease: agreement for exclusive possession for an agreed term

[d] Outcome

- **‘In substance’ security interest**
 - This transaction is likely to fall under PPSA s 12(1) → is a security interest
- **Deemed security interest:**
 - Because the transaction likely falls under PPSA s 12(3), the parties may not have intended this transaction to secure their interests.
 - Accordingly, they may need to take further steps to comply with the PPSA
- **Outcome for both:**
 - Once the parties are in compliance with the PPSA (including registration on the PPSR), the priority of the interest would postpone other interests except in very narrow circumstances (as per PPSA ss 19-21)

- [A] Relevant securities:

- **ALLPAP** → all present and after-acquired property
- **Retention of title arrangements**
 - What is PPSA ROT Property? (s51F CA)
 - (1) **Property** is **PPSA retention of title property** (short for **Personal Property Securities Act retention of title property**) of a **corporation** if:
 - (a) the **property** is **personal property**; and
 - (b) the **property** is used or occupied by, or is in the **possession** of, the **corporation**; and
 - (c) the **corporation** does not have title to the **property**; and
 - (d) a **PPSA security interest** is attached to the **property**, within the meaning of the **Personal Property Securities Act 2009**; and
 - (e) the **corporation** is the grantor in relation to the **PPSA security interest**, within the meaning of that Act.
 - ROT = Purchase Money Security Interest
- **Purchase Money Security Interest (PMSI)**
 - **Definition:** A PMSI means any of the following:
 - a security interest taken in collateral, to the extent that it **secures all or part of its purchase price (PPSA s14(1)(a))**;
 - a security interest taken in collateral by a person who gives value for the purpose of enabling the grantor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights (PPSA s14(1)(b));
 - the interest of a lessor or bailor of goods under a PPS lease (PPSA s14(1)(c));
 - the interest of a consignor who delivers goods to a consignee under a commercial consignment (PPSA s14(1)(d))
 - **Exceptions:** However, a PMSI does not include:
 - an interest acquired under a transaction of **sale and leaseback to the seller** (PPSA s14(2)(a))
 - an interest in special collateral (that is chattel paper, an investment instrument, a monetary obligation or a negotiable instrument) (PPSA s14(2)(b))
 - a security interest in collateral that the grantor **intends to use predominantly for personal, household or domestic purposes (PPSA s14(2)(c))**
 - **Exclusion:** Unless the collateral is required to be described by serial number (PPSA s14(2A))
 - **Mixed securities:** If security secures obligations covered by PMSI, and also non-PMSI, then the security is **PMSI only to the extent that s14(1) is satisfied (PPSA s14(3),(4)) i.e PMSI**
- Finance leases
- Consignments
- Operating leases > 2 years
- Certain trust arrangements

Step 0: ASK: Have you perfected before the trigger event (e.g. appointment of liquidation)

- **(4) A single registration may perfect one or more security interests.**
- **Defective perfections**
 - **Rule:** A registration may be ineffective because of a defect (**PPSA s164**)
 - **Defects may arise where:**
 - There is a **seriously misleading defect** in any data relating to the registration (**s164(1)(a)**)
 - **There is one the defects listed in s165 (s164(1)(b)):**
 - Collateral required to be registered by serial number and no search by serial number would reveal rego (**PPSA s165(a)**)
 - Search of register by grantor's details would not reveal registration: **s165(b) PPSA**
 - If registration as a **PMSI**, but security interest not a PMSI to any extent: **s165(c)**
- **[C] Consequence of not perfecting property:**
 - **Rule: Unperfected PPSA ROT vests in the grantor** of the security upon bankruptcy or insolvency situations (appointment of liquidator etc) in **s267 PPSA**. The "secured party" then loses security interest but still has a debt claim
 - May be included within "property of the company" (*CA s51F*)
 - **Requirement to register within time: [OR else vest upon Liq/VA/Receiver/DOCA/SBR]**
 - **Rule:** Where not perfected by possession or control, **must register within 20 business days after the security arrangement comes into force OR be registered for more than 6 months before the appointment of a VA or liquidator (s588FL(2)).**
 - **Failure to comply:** vests in the grantor (**s588FL**)
 - **Extension of time by court = no vesting (s588FM)**
 - Extension may be granted in exercise of discretion if satisfied (s588FM(2)):
 - (a) Where the failure to register the collateral earlier:
 - (i) Was accidental or due to inadvertence or some other sufficient cause (**s588FM(2)(a)(i))**; **OR**
 - (ii) Is NOT of such a nature as to prejudice the position of creditors or shareholder (**s588FM(2)(a)(ii))**; **OR**
 - (b) On other grounds it is just and equitable to grant relief (**s588FM(2)(b))**.
 - **Taking free rules**
 - **Unperfected:** A **buyer or lessee** of personal property, **for value**, takes the personal property **free of an unperfected security interest** in the property (**PPSA s 43(1)**)
 - **Exceptions:** This does not apply if the unperfected security interest was created or provided for by a transaction to which the buyer or lessee is a party, unless the personal property concerned is of a kind prescribed by the regulations for the purposes of **PPSA s43 (PPSA s43(2))**
 - **Search of serial number found nothing immediately prior to sale:** A buyer or lessee of personal property takes the personal property free of a security interest in the property if it may be described by some serial number in a registration, and searching the register immediately before sale or lease would not reveal the serial number (**PPSA s44(1)**)
 - **Exceptions:** This does not apply if:
 - the buyer or lessee holds the personal property as **inventory** or on behalf of the person who would hold collateral as inventory (**PPSA s44(2)(a))** **OR**
 - the security interest was created or provided for by a transaction to which the buyer or lessee is a party, unless the personal property concerned is of a kind prescribed by regulations for the purposes of this paragraph (**PPSA s44(2)(b))** **OR**
 - within 24 months after registration commencement, the security interest is a **transitional security interest** (a security interest provided for by a transitional security agreement) (other than a migrated security interest in a motor vehicle or watercraft) (**PPSA s44(3)**)
 - **Motor vehicle:** A buyer or lessee, for new value, of a motor vehicle takes the motor vehicle free of security interest in the motor vehicle if it may be described by some serial number, and searching the register immediately before sale or lease (for new value) would not reveal serial number (**PPSA s 45(1)**)
 - **Exceptions:** This does not apply if:
 - the secured party is in possession of the motor vehicle immediately before the time of the sale or lease (**PPSA s45(2)(a))** **OR**
 - the motor vehicle is bought at a sale held by or on behalf of an execution creditor (**PPSA s45(2)(b))** **OR**

- the buyer or lessee holds the personal property as inventory or on behalf of the person who would hold collateral as inventory (**PPSA s45(2)(c)**) OR
- the buyer or lessee buys or leases the motor vehicle with **actual or constructive knowledge** of the security interest (**PPSA s45(2)(d)**)
- **Ordinary course of business:** A buyer or lessee of personal property takes the personal property free of a security interest given by the seller or lessor, or that arises under PPSA s32 (proceeds-attachment), if the personal property was sold or leased in the ordinary course of the seller's or lessor's business of selling or leasing personal property of that kind (**PPSA s46(1)**)
 - **Exceptions:** This does not apply if:
 - Where the personal property may, or must, be described by serial number, the buyer or lessee holds the personal property as inventory or on behalf of the person who would hold collateral as inventory (**PPSA s46(2)(a)**) OR
 - in any case, the buyer or lessee buys or leases the personal property with **actual knowledge** that the sale or lease constitutes a breach of the security agreement that provides for the security interest (**PPSA s46(2)(b)**)
- **Personal, domestic or household property:** A buyer or lessee of personal property, for new value, that the buyer or lessee intends (at the time of purchase or lease) to use predominantly for personal, domestic or household use if the **market value** for the personal property is **\$5,000 or less** (**PPSA s47(1)**)
 - **Exceptions:** This does not apply if:
 - the personal property is of a kind that the regulations provide may, or must, be described by serial number (**PPSA s47(2)(a)**) OR
 - the buyer or lessee buys or leases the personal property with **actual or constructive knowledge** that the sale or lease constitutes a breach of the security agreement that provides for the security interest (**PPSA s47(2)(b)**) OR
 - at the time the contract or agreement providing for the sale or lease is entered into, the **buyer or lessee believes**, and it is actually the case, that the market value of the personal property is **more than \$5,000** (**PPSA s47(2)(c)**)
- **Temporary perfection:** A buyer or lessee, for new value, of the proceeds of personal property, or of goods or a negotiable document of title, takes the proceeds, goods or document free of a security interest that is **temporarily perfected by force of this Act** (other than a transitional security interest perfected by force of PPSA s322) immediately before the time of the sale or lease, if the security interest is not otherwise perfected at that time (PPSA s 52)
 - **Exceptions:** This does not apply if the buyer or lessee has **actual knowledge** that the sale or lease constitutes a breach of the security agreement that provides for the security interest **at:**
 - the time new value is first given for the sale or lease, if the personal property is bought or leased with the intention of using it predominantly for personal, domestic or household purposes (**PPSA s52(2)(a)**)
 - in any other case, the time of sale or of entry into agreement for the lease (**PPSA s52(2)(b)**)

Priority rules

- **Summary**
 - **Perfected prevails unperfected** (s55(3) PPSA)
 - **First in time better in right**
 - **Perfected = first in Priority Time** i.e. register, possession or control, or temporary perfection (s55(4) PPSA)
 - **Unperfected = first to attach** (s55(2) PPSA)
 - **PMSI perfected prevails perfected even if later in right** (s62 PPSA)
 - PMSI: Is it lent to purchase property/goods?
 - **Perfection by control prevails over everything** (s57 PPSA)
- **[a] Default rules**
- **[b] Special rules**
- **[c] Purchase Money Security Interest (PMSI)**
 - Generally: ROTs and leases security interests

[a] Default priority rules: PPSA s55 sets out the priority between security interests in the same collateral where there is no other way of determining that priority

- **Knowledge irrelevant:** Knowledge of the prior interest is largely irrelevant. The priority contest is not based on actual or constructive knowledge.
 - However, note that some taking free rules recognise knowledge as an exception (e.g., PPSA s47(2)(b))
- **Only PPSA security interests:** The PPSA priority rules only deal with priority between 'PPSA security interests'. They do not deal with non-PPSA vs PPSA priority contests.
- **Priority between unperfected interests:** Priority between unperfected interests is determined by order of attachment of the security interests (**PPSA s55(2)**)
- **Priority between perfected and unperfected:** A perfected security interest has priority over an unperfected security interest (**PPSA s55(3)**)
 - A later created security interest may beat a prior interest by perfecting it first (e.g., through registering)
- **Priority for perfection in other ways:** Priority between security interests is to be determined by earliest 'priority time' (**PPSA s55(4),(5)**):
 - **Priority time:** The priority time for a security interest in collateral is, subject to PPSA s55(6), the earliest of the following times to occur in relation to the security interest:
 - **registration** (even if registration occurs prior to attachment (**PPSA s161**)) (**PPSA s55(5)(a)**)
 - **perfection by possession or control** (**PPSA s55(5)(b)**), OR
 - **temporary perfection** (e.g., by transfer of collateral) (**PPSA s55(5)(c)**)
 - **Continuously perfected:** The priority time must remain 'continuously perfected' until enforcement (PPSA s56)

[b] Special priority rules

- Transitional security interests (PPSA s320)
- **Perfection by control:** Perfection by control **beats all other forms** of perfection (note only some forms of collateral may have security interests perfected by control) (**PPSA s57**)
- **Priority over proceeds and advances will be same as for original security agreement (PPSA s33,58)**
 - SA provide for collateral; registration effective re collateral that covers the proceeds/specify it covers
- **Bank security interests in ADI accounts held by them beat all other security interests (PPSA s75)**
- **PMSI (PPSA s62-65)**
- Payment of debt in ordinary course of business (PPSA s69)
- Negotiable interests, chattel paper and negotiable documents of title (PPSA ss70 72,79-81)
- Transferred collateral (PPSA s34)
- Accessions (PPSA Pt3.3)
- Commingled goods (PPSA Pt3.4)
- Voluntary subordination possible (PPSA s61)

[c] Priority of PMSI

- **General rule:** A perfected PMSI will generally take priority over other security interests (**except those perfected by control or over accounts for new value**) (**PPSA s57, 64, 75**)
 - Registration of financing statement must state that security interest is a PMSI
- **Inventory:** For PMSI over goods held as inventory, the PMSI has priority if it is in inventory and is **perfected by registration at the time before the grantor takes possession of the goods** (**PPSA s62(2)**)
- **Not in inventory:** For PMSI over goods not held as inventory, the PMSI has priority if the PMSI is perfected by **registration within 15 business days after the grantor takes possession of goods** (**PPSA s62(3)**)
 - Constructive possession does not operate, only actual or apparent possession (**PPSA s24**)
- **Defective registration:** Claiming PMSI status is a serious defect in a financing statement if the security interest is not a PMSI to any extent (**PPSA s165(c)**)
- **Extensions of time:** Extensions of time for PMSI super priority may be obtained under **PPSA s293**

WEEK 5 LIQUIDATION I

1. Commencing Court Liquidation/Compulsory Winding up

a. Commencement grounds:

i. Insolvency (s459A and s459B) or

1. s459B: → on grounds in ss232, 462, 464

a. S232: oppressive conduct within the company

b. S462: grounds in s461 → minority oppression, just and equitable grounds

- a. **Eligibility criteria**
 - i. Liabilities must not exceed \$1m (**s500AA**)
 - ii. Procedure not used within last 7 years (**reg 5.5.03**)
 - iii. Liquidator must make this decision within 20 business days of triggering event (i.e. end of VA or special resolution) (**s500A(2)**)
 - iv. **>=25% creditors calls for cessation**: Liquidator must stop the simplified liquidation if — Creditors with at least 25% of the debts (not related parties) request to cease (**s500AB; reg 5.5.09**)
- b. **Directors eligibilities**
 - i. **Liquidator must stop SL if: Director commits fraud or dishonesty** (reg 5.5.07)
 - ii. **No** director of Co used SL (for another Co as director) within the last 7 years (**reg 5.5.03**)
 - iii. Directors **must give declaration** about eligibility for simple liquidation (**s498**)
 1. Reg 5.5.02 (and a declaration about voidable transactions)
- c. **Procedure s500AE**
 - i. Modification of unfair preferences; modified reporting; no meetings; only 1 dividend; no Committee of Inspection; no reviewing liquidator
- ii. **Members voluntary liquidation (MVL)** → Co must be solvent – able to pay all debts within 12 mths
 1. **Cannot be used in s490 circumstances**
 - a. When an application for winding up in insolvency has been filed (**s490(1)(a)**)
 - b. Court has ordered winding up in insolvency, whether or not the order was made on such application (**s490(1)(b)**)
 - c. The company is a trustee company (under Ch 5D) that is in the course of administering or managing one or more estates (**CA s490(1)(c)**)
 2. **Procedure**
 - a. Members to pass special resolution (**s491**) → >=75% Votes (special resolution as defined in s9 which refers to s250MA)

Requirements for a special resolution

For a resolution of a company to have effect as a special resolution:

- (a) notice given under section 249J of the meeting at which the resolution is proposed must include the information required by paragraph 249L(1)(c) in relation to the resolution; and
- (b) the resolution must be passed by at least 75% of the votes cast by members who are entitled to vote on the resolution; and
- (c) the resolution must be otherwise valid.

- b. Directors must pass a solvency resolution – company will be able to pay its debts in full within 12 months (**CA ss9, 494**)
 - i. **S494**: directors may do this, but s9 def of 'members' voluntary winding up' requires a director's resolution – if no declaration the liquidation must proceed as creditors' voluntary liquidation
 - ii. **If liquidator believes Co insolvent** → must take action under s496 incl convening a creditors' meeting to determine if a CVL should proceed
 - c. Members appoint a liquidator (**s495**)
 - d. Business to cease except for beneficial disposal or winding up (**s493**)
 - i. Share transfers after winding up resolution are void unless liquidator consents (**s493A**)
- b. **Liquidation commences** – on the day on which the resolution for winding up was passed (**s513B(e)**), **unless**
- i. **s513B(a)**: if company was in liquidation → when the last - mentioned winding up is taken because of this Division to have begun or commenced
 - ii. **s513B(b)**: if company was in VA, the s513C day for the VA
 - iii. **The s513C day in relation to the preceding VA**
 1. If Company was under a current DOCA when the resolution was passed (**s513B(c)**), OR

2. Company was under a DOCA and the creditors passed a resolution terminating the DOCA and for a winding up (**s513B(d)**); **OR**
3. The court terminated the DOCA (**s513B(da)(i)**); **OR**
4. The DOCA terms provide for the DOCA to terminate and the company be wound up (**s513B(da)(ii)**)
- iv. **s513B(dc) and (de)** if the company was in restructuring or subject to a restructuring plan (under Pt 5.3B) the s513CA day in relation to the restructuring

3. Effect of Appointment of Official Liquidator

a. Powers of Liquidators

i. General powers

1. Controls company and its property (S198G) → excl trust property, supply under ROT and leased property
2. **Bring or defend any proceedings (CA s477(2)(a))**
3. **Pay creditor in full**, subject to s556 priority payments (**CA s477(1)(b)**)
 - a. No unfair preferences because payment after co in liq cf before
 - b. If other creditors unhappy → apply under IPS 90-20; Court can make any order under IPS 90-15; but amount needs to be <\$100k or else court leave required
4. **Put Co into VA (s438B)**
5. **s477(2)(m) Catch all power** – to do “all such other things as are necessary for winding up the affairs of the company and disturbing its property”
6. **Apply for Court directions IPSC s90-15**
 - a. Can include **substantive rights (Re Hawden Property)**
 - b. **Unconstrained power (Hutson)**
 - i. However: ‘the words of s 90-15(1) confer on the Court a broad power to make orders in relation to an external administration that is being conducted **in accordance with the relevant provisions of Chapter 5**, but not to modify the operation of those provisions.’ **Re DSHE Holdings Ltd [2021] NSWSC 608 at [69]**
 - c. **NOT re**: Won’t usually be given on matters of **purely commercial judgment** – **Re Ansett Australia Ltd and Korda (No 3) [2002] FCA 90**

ii. Compromise or arrangement power

1. **Court liq s477(1) & by s506 (for voluntary liq): (c)** compromise/arrangement re claim by creditors against Co; **(d)** re calls/liabilities etc bw Co and Contributory or other debtor or person apprehending liability to Co
 - a. (c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging that they have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or whereby the company may be rendered liable; and
 - b. (d) compromise any calls, liabilities to calls, debts, liabilities capable of resulting in debts and any claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the property or the winding up of the company, on such terms as are agreed, and take any security for the discharge of, and give a complete discharge in respect of, any such call, debt, liability or claim.
2. Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company **must not compromise s477(2A) – debt compromise over \$100k (Reg 5.4.02)**
 - a. Debt cf claim for unliquidated damages
3. **Cannot make preferential payment to one creditor** – cannot depart from principle of equality under s501 CA to the adv of that creditor and disadvantage of other creditors; without the assent of those other creditors (**Re Wily**)

iii. Conduct compulsory examinations under oath (ss596A, 596B)

iv. Disclaim unprofitable contract or property (s568)

1. **Effect**: extinguish the company’s rights, interests and liabilities in disclaimed property (**s568D**)

- i. Dispositions of assets or attachments over assets are void unless liq or court approves (**s468, 471B(2)**)
 - 1. Court liq (s500(1))
 - 2. Voluntary liq no equivalent of s468
- ii. Share transfers generally (s468A)
- c. **Impact on property**
 - i. Vesting of **unperfected security interests** upon order of winding up (**s267(1)(a)(i) PPSA**)
 - ii. Vesting of **late registered security interests** – s588FL CA
 - iii. **Stay on creditor claims (s471B)**
 - 1. Not secured claims (**s471C**) – who may enforce security e.g. appoint receiver
 - 2. Creditors rights change from enforcement to submit POD (claim in the collective process)
 - iv. Appointment does not vest property in liquidator, company continues until deregistration
 - v. **Stay or moratorium (s471B for Court liq; s500(2) for voluntary liq)**
 - 1. **Rule:** Court leave required to commence or continue with proceedings against the company or its property. The court may impose terms on any leave granted – must show a **prima facie case → serious question to be tried** and some **good reason to depart from the proof of debt regime**.
 - 2. Relevant factors: (**Re Gordon; Swaby; ZOLL**)
 - a. The amount and seriousness of the claim
 - b. The degree of complexity of the legal and factual issues
 - c. The stage of the proceedings
 - d. Whether there is a good cause of action
 - e. Whether the action would affect the orderly winding up of the company
 - f. Whether the action would prejudice the other creditors
- d. **Changes to Co**
 - i. Director must report to liquidator and produce books
 - ii. Company must put '(in liq)' in all public docs (s541CA)

4. Independence of liquidators

a. Who can be a liquidator:

- i. Disqualified person cannot (see s532)
- ii. **Grounds for disqualification:** s532(2) (modified by s532(3), (4) and (5) in some cases) – court may grant leave to be appointed notwithstanding disqualification under s532(2)
 - 1. **s532(2)** Various connections with the Co, incl debtor or creditor for >=\$5000, or an auditor/officer/employee of the company
 - a. **LEGISLATION subs(2)** Subject to this [section](#), a [person](#) must not, except with the leave of the [Court](#), seek to be appointed, or act, as [liquidator](#) of a [company](#):
 - b. (a) if the [person](#), or a [body corporate](#) in which the [person](#) has a [substantial holding](#), is indebted in an [amount](#) exceeding \$5,000 to the [company](#) or a [body corporate](#) related to the [company](#); or
 - c. (b) if the [person](#) is, otherwise than in his or her capacity as [liquidator](#), a [creditor](#) of the [company](#) or of a [related body corporate](#) in an [amount](#) exceeding \$5,000; or
 - d. (c) if:
 - i. (i) the [person](#) is an [officer](#) or [employee](#) of the [company](#) (otherwise than by reason of being a [liquidator](#) of the [company](#) or of a [related body corporate](#)); or
 - ii. (ii) the [person](#) is an [officer](#) or [employee](#) of any [body corporate](#) that is a [secured party](#) in relation to [property](#) of the [company](#); or
 - iii. (iii) the [person](#) is an [auditor](#) of the [company](#); or
 - iv. (iv) the [person](#) is a partner or [employee](#) of an [auditor](#) of the [company](#); or
 - v. (v) the [person](#) is a partner, employer or [employee](#) of an [officer](#) of the [company](#); or
 - vi. (vi) the [person](#) is a partner or [employee](#) of an [employee](#) of an [officer](#) of the [company](#).
 - 2. **If appointed under voluntary liquidation** – must lodge **declaration of relevant interests and indemnification** as soon as appointed (**ss506A, 60**)
 - 3. Not independent or reasonably seen as not independent
 - iii. Declaration of Relevant Relationships and Declaration of Indemnities (DIRRI): s506A (voluntary liquidation), definitions in s60 and s9

b. Procedural rules

- i. Liquidators must be **registered (s532(1))**, IPSC Div 20, except MVL for a Pty Ltd company (s532(4))
- ii. Must **consent in writing to be appointed (s532(9))**
- iii. **Court may inquire** into the liquidation (IPSC s90-5, 10) or remove liquidator (IPSC s90-15)

c. Duties

- i. **Legal status of liquidator:** Officer of company (s9 definition of officer → refers to s9AD, s9AD(h) liquidator)
- ii. **Fiduciary duties apply (CAC v Harvey [1980] VR 669)**
 - 1. Must act in the best interests of all creditors, be impartial and be seen to be impartial
 - a. **Actual and perceived independence (Re Biposo) –**
 - b. **Test for apprehended bias:** whether “a *fair-minded lay observer might reasonably apprehend that the liquidator might not bring an impartial mind to the matters to be determined*” (**ASIC v Franklin [59]**)
 - i. But NB: Liquidators must attract work therefore have to develop personal relationships (**Franklin**)
 - ii. **Franklin** → referral relationship between the liquidators and a private equity adviser could give rise to a perception of bias where the adviser was involved in selecting the liquidators, had previously worked with the liquidators’ firm and it would be expected that future work would be given to them
 - iii. **Could be permitted to work despite prior involvement with CO, so long impartiality is not impede or inhibited** → **ASK: Can they still act in the best interest of ALL creditors?**
 - 1. Whether there would be a reasonable apprehension by any creditor of lack of impartiality on the liquidator is part in the circumstances, by reason of prior association with the company or those associated with it, including creditors, or indeed any other circumstance (**Advance Housing**)
 - 2. E.g. permit voluntary liquidator to be appointed who has given financial advice to directors (**NAB v Market Holdings**)
 - 3. Pre-appointment conference with creditor is not breach (**Re Club Superstores**)
 - 4. Acknowledged that 40-50% work from referral (**Waltons**) – there may be bias (10% might be fine)
 - iv. **Creditor consent may not cure breach but may be relevant (Walley)**
 - 1. fair-minded observer is NOT limited to creditor (**Ten Network Holding [2017] FCA 914**)
 - 2. Duty of care, diligence and good faith since liquidator in a position of trust (**ASIC v Edge**)
 - 3. Candour, honesty and integrity → repository of public trust (**Iannuzzi**)
 - 4. **Official Liquidators** = reps of court (**CAC v Harvey**) → higher standard not to cause contempt of court
 - 5. Profits or advantages from external administration prohibited (**IPS s60-20**)
- iii. **Remain subject to powers of the court:** control and direction of court (**IPSC Div 90**) → \
 - 1. courts may inquire (IPS s90-5, 10) or remove (IPS s90–15) a liquidator.
 - 2. ASIC can refer a liquidator to disciplinary committee (IPS Div 40)
 - 3. Creditors can remove the liquidator (IPSC s90-35)

5. Reporting

- a. **Reinitial report IPS s70-30** → overview of procedure and advising of creditor rights
- b. **Statutory 3 month report IPRC s70-40**
 - i. Inquiries made, report on Co’s business and cause of liquidation
 - ii. Potential recovery actions and potential for dividend +further action
- c. **Annual administration return, end of administration return lodged with ASIC**
- d. **Report to ASIC on potential offences (s533)** → modified in simple liq (reg 5.5.05)

6. Creditor Meetings

- a. **Who can convene**
 - i. **Liquidator can convene** a meeting any time IPSC s75-10 but not in simple liq
 - ii. **Creditors can direct liquidator** to hold a meeting **IPSC s75-15**
 - 1. By **resolution** of the creditors

2. **Quantity:** >25% in value, or between 10% and <25% in value (provide costs)
3. Committee of inspection can direct liquidator to hold a meeting
4. Liquidator need not comply if request unreasonable (IPRC s75-250)
5. Does not apply to simple liquidation (s500AE(2))
- iii. ASIC can direct liquidator to convene a meeting: IPSC s75-20 (not for simple liquidation)
- iv. Meetings to **approve remuneration determination** (IPSC s60-10)
- b. **Other rules:**
 - i. Committee of inspection meetings (IPSC/IPRC Div 80) (not for simply liquidation)
 - ii. **Liquidator as chair (IPRC s75-50)** can admit or reject proof of debt for meeting purposes (IPRC s75-90, 75-100)
 - iii. Secured creditors can only vote on unsecured amounts (IPRC s75-87)
- c. **Resolution:** majority in number of creditors voting and majority in value of debt held by such creditors (IPRC s75-115)
 - i. 'Special resolution' not relevant in liquidation
 - ii. Not majority of all creditors, only those voting count
 - iii. Voting is **generally on the voices, unless a poll is demanded: IPRC s75-110**
 1. **Except for virtual meetings**, where a poll must be taken (IPR s75-110(1))
 - iv. Voting can be in person (including online) or by proxy
 - v. Some decisions can be made without a meeting: IPSC s75-40; IPRC s75-130
 1. Consider whether provision says 'passing a resolution' or 'by resolution at a meeting'
 2. Proposal put by liquidator to creditors (voting online/mail)
 3. >25% in value of creditors can object to a proposal without a meeting being used (IPRC s75-130)
 - vi. Adjournment may be by resolution of creditors or by decision of liquidator (who chairs the meeting): IPRC s75-140
 - vii. Chair has casting vote: IPRC s75-115 → Not for removal or remuneration vote

7. Creditor rights

- a. **Submit a proof of debt** (if called for by liquidator) (s553D)
 - i. Liquidator can rule on proof (regs 5.6.39-5.6.66)
- b. **Attend and vote at a creditors' meeting** (IPS/IPR Div 75)
 - i. Vote on a resolution without a meeting
 - ii. Request that a meeting be convened (IPS 75-15)
- c. **Approve proposals by liquidator** (remuneration determination: IPS 60-10; general powers liq: s477(2A),(2B))
- d. **Give directions to liquidator** (IPS Div 85)-but not bound to follow them
- e. **Receive a dividend** if liquidator declares that one is payable (reg 5.6.67)
- f. **Participate in a committee of inspection (COI)** (IPS Div 80)
- g. **Seek information from liquidator** (IPS s70-40)
 - i. Individual creditor may seek information (IPS s70-45)
 - ii. Complying with information requests (IPR s70-1 to s70-15)
- h. **Remove the liquidator (IPS s90-35)**
- i. **Appoint a reviewing liquidator** (IPS s90-24)
 - i. Can only review Liquidator remuneration and expenses
- j. Seek court orders (IPS s90-15)

WEEK 6 LIQUIDATION II

1. Who are creditors

- a. For distribution → parties who have provable debts or claims against Co; whose proof of debt accepted by liquidator in whole or in part
- b. For voting → Chair has power to admit or reject proof (IPR s75-85)

2. Creditor's claims – provable debts & priority payments

- a. **What are provable debts s533(1) CA:** Subject to this Division and Division 9, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred **before the relevant date**, are admissible to proof against the company.
 - i. **Relevant date:** when winding up is taken to have begun (ss9, 513A)

legislation” . *Gye v McIntyre* (1991) 171 CLR 609 at 618-619 cited in *Metal Manufacturers Pty Ltd v Morton* [2023] HCA 1 at [16]

- c. **Section 553C operates automatically** at the time of the winding up (insolvent winding up):
 - i. **Mutual credits, mutual debts or other mutual dealings**
 - 1. **Not:** Debts due in different capacities (e.g. partner, trustee) aren't mutual
 - 2. Mutual refers to **reciprocity rather than identical or the same** (e.g. different beneficial ownership)
 - ii. Between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company [**Requirements**]
 - 1. **Claim must be provable** - no need that a proof of debt has been accepted
 - 2. Claim must **exist at the time of the commencement of the winding up**
 - 3. Claim must **be capable of converting into monetary amount**
 - iii. See *Gye v McIntyre* (1991) 171 CLR 609; *Re Force Corp Pty Ltd* (in liq) [2020] NSWSC 1842 at [78] – [107]
 - 1. An account is to be taken of what is due in respect of the mutual dealings
 - 2. This may leave the company owing money or the creditor owing money
- d. Set off under s 553C is **not available** if creditor had notice of insolvency at the time of incurring or giving credit:
 - i. **Requires:** “**actual notice** of facts which disclose that the company lacks the ability to pay its debts as and when they fall due”) *Jetaway Logistics v Deputy Commissioner of Taxation* [2009] VSCA 319
- e. As a general matter, set-off may arise under s553C (and other statutes), under contract or under equitable principles
 - i. Contractual agreement can't exclude s553C – it is “mandatory”
 - ii. Statutory (553C) set-off may not exclude other set-off rights if it does not apply (e.g. no mutuality): *Hamersley Iron* [2018] WASCA 163 at [174] obiter dicta

7. PRIORITY PAYMENTS

- a. **Proof of debt be accepted:** Payment of a dividend depends upon having a proof of debt accepted by the liquidator (reg5.6.63)
- b. **General rule of ‘pari passu’ or rateable distribution** to admitted creditors (s555), but this is subject to statutory exceptions
- c. **General priority order:**
 - i. **Secured debts** (via security rights)
 - ii. **Priority debts (s556)**
 - 1. Liquidator expenses s556(1)(a)
 - 2. **Employee entitlements**
 - a. **ss556(1)(e),(g),(h)**
 - i. (e) subject to [subsection](#) (1A)--next:
 - 1. (i) [wages](#), [superannuation contributions](#) and [superannuation guarantee charge](#) payable by the [company](#) in respect of services rendered to the [company](#) by [employees](#) before the [relevant date](#); or
 - 2. (ii) [liabilities](#) to pay the [amounts](#) of estimates under [Division](#) 268 in Schedule 1 to the [Taxation Administration Act 1953](#) of [superannuation guarantee charge](#) mentioned in subparagraph (i);
 - ii. (g) subject to [subsection](#) (1B)--next, all [amounts](#) due:
 - 1. (i) on or before the [relevant date](#); and
 - 2. (ii) because of an [industrial instrument](#); and
 - 3. (iii) to, or in respect of, [employees](#) of the [company](#); and
 - 4. (iv) in respect of [leave of absence](#);
 - iii. (h) subject to [subsection](#) (1C)--next, [retrenchment payments](#) payable to [employees](#) of the [company](#).
 - b. **Excluded employees s556** → director (within 12 mth period ending on relevant date/or is director at relevant date), spouse, relative of such director.
 - i. **Non-priority days:** days they were excluded employees
 - c. **Some limitations for excluded employees ss556(1A) and (1B) and (1C)**

- i. (1A) The amount or total paid under paragraph (1)(e) to, or in respect of, an excluded employee of the company must be such that so much (if any) of it as is attributable to non - priority days does not exceed \$2,000.
 - ii. (1B) The amount or total paid under paragraph (1)(g) to, or in respect of, an excluded employee of the company must be such that so much (if any) of it as is attributable to non - priority days does not exceed \$1,500.
 - iii. Retrenchment payments
 - iv. (1C) A payment under paragraph (1)(h) to an excluded employee of the company must not include an amount attributable to non - priority days.
- d. Payment of these amounts (by payment to the company to pay the employees) receives the same priority (s560)
- e. These amounts must be paid before holder of circulating security interest (s561)
- f. Importantly they also have priority over circulating security interests if the company's other property is insufficient to pay the entitlements in full: s 561
- g. Note the **Fair Entitlement Guarantee Act 2012 (FEG)**: available where liquidation or bankruptcy of employer, tailored to recovery under CA (i.e. s560) or BA priorities
 - i. E.g., an employee loses their entitlements because their company went into liquidation. You go to FEG and said that you have lost all your employee entitlements (wages, long service leave etc BUT this excludes super). FEG writes you a cheque. Then FEG stands in your place during the liquidation and will get paid a distribution accordingly.
- iii. **General admitted unsecured debts or claims**
- iv. **Members (only if surplus)**
- d. No Crown priority (note other powers of ATO)
- e. Court may give priority to particular "indemnifying" creditors under s564

INSOLVENT TRADING

8. Who can sue? [PAGE 125-126]

- a. **Liquidators & creditors – s588M**
 - i. Liquidators get first preference for enforcing the insolvent trading provisions (**s588M(2)**)
 - ii. Creditors can also enforce insolvent trading provisions by applying under ss588R-U, if they have liquidator approval (s588R) or by court (s588T), to recover compensation for loss or damage suffered in relation to a wholly or partly unsecured debt in breach of s588G (**s588M(3)**)
- b. **ASIC – s588J**
 - i. May sue for insolvent trading and court may order compensation to be paid the company, for equal amount to loss or damage to the unsecured creditor
 - ii. Declaration of civil penalty order under s1317E, proceed to s206C disqualification
- c. **Individual directors – Statutory Derivative Action**

9. Duty of directors to prevent insolvent trading

- a. **ELEMENTS: S588 applies if (s588G(1))**
 - 1. A person is a **director** of a company: **s588(1)(a)**
 - 2. At the time the company incurs a debt: **s588(1)(a)**
 - **A. Deemed debts with prescribed incurrence time (s588G(1A))**
 - Include: paying a dividend, buying back shares etc [PAGE 121]
 - Entering into an uncommercial transaction under s588FB → phoenix activity
 - **B. Unavoidable obligation to pay a sum of money in the future (Hawkins v Bank of China)**
 - Includes contingent liabilities and debts
 - Does not include unliquidated damages → e.g. claims against the Co which judgement not handed down yet (**Box Valley**)
 - **When are debts incurred**
 - **Leases (rent)**: when lease executed rather than when rent accrues, except for tenancy at will (in which case debt incurred by failing to give notice to terminate)
 - **Guarantees**: when contract executed
 - **Penalty interest**: when conduct creates liability to penalty
 - **Roll over of debt facilities**: when original facility entered into
 - **Quantum meruit claims**: when work commences
 - **Taxes**: s588F– when deduction from wages is made; when the income is earned (except penalties which accrue when conduct gives rise to penalty)

- Ought to have known – the objective reasonable director in the director's position of ordinary competence and ability to understand the financials of the Co (**Metropolitan Fire Systems**)
- **Holding company to prevent insolvent trading**
 - Holding company has duty to prevent insolvent trading in subsidiary (**s588V**)
 - Safe harbour rule for holding Cos: if the company took reasonable steps to ensure that the safe harbour applies to the directors and the debt of the subsidiary (**s588WA**)
- **Defences – s588H**
 - **Solvency**: Reasonable grounds to expect (and did expect) that the company was solvent (**s588H(2)**)
 - **RULE**: Suspicion is insufficient (**Metropolitan Fire Systems**), more likely than not (**Hall**)
 - **Hall v Poolman** → can rely on liquidity ratio to demonstrate current assets > current liabilities (up to those maturing in 3 months time)
 - **Reasonable Reliance**: Reasonable reliance on the information from a reliable person who was responsible for providing information to the director (**s588H(3)**)
 - **May not suffice where advice not retained for solvency (Re McLelland)**
 - E.g, requesting info from usual financial advisor may be insufficient
 - Uncommercial advice e.g. phoenix transaction would unlikely suffice → “reasonable person” not since it is a deemed debt as per s588G(1A)
 - **Did not establish third-party was competent and reliable (Re Wild K9)** → Director of Hotel saying another director operated hotel therefore relied on it. Director duties imposed for a reason, cannot simply say relied on another director.
 - **Illness etc**: Justifiable non-participation (**s588H(4)**)
 - Not that director cannot understand financial statements (**DCT v Clark**)
 - Director who relies on (husband) another director still liable → irreducible duty (**Daniels v Anderson**)
 - Director who was deceived and excluded by others therefore failed to engage in an active role (**Tourprint v Bott; Gold Ribbon**)
 - **Took reasonable steps to prevent**: Reasonable steps taken to prevent incurring of a debt (**s588H(5) & (6)**)
 - E.g. voting against at resolution and resign for risk of insolvency, appointing administrator
 - **ss1317S or 1318 acted honestly and ought fairly be excused?**
- **Safe Harbour s588GA [PAGE 126]**
 - **Rule**: Director to discharge burden (**s588GA(3)**) by adducing sufficient evidence to suggest a reasonable possibility that the elements of the safe harbour exist (**s588GA(7)**). **S588G(2) liability not to apply.**
 - **Elements: S588GA(1)(a)**
 - At the time when the debt is incurred,
 - Debt be incurred in connection with the course of action or in the ordinary course of the company's business (**s588GA(1)(b)**)
 - Suspects the company may become or may be insolvent, and
 - Starts **developing one or more courses of action which are reasonably likely to lead to a better outcome** for the company than an immediate appointment of administrator or liquidator
 - **Re Balmz** → Directors of 2 cafes engaged a business advisory firm that promoted itself as assisting with tax disputes (Co did not pay tax for 4 years), director provided no evidence of what the advice was.
 - Uncommercial transaction – phoenix activity advice would unlikely suffice since s588G(1A) deems this as incurring of debt → it could not make insolvency situation better
 - **Reasonably likely to lead to better outcome non-exhaustive factors: s588GA(2)**
 - (a) the person is **properly informing himself or herself of the company's financial position**; or
 - (b) the person is **taking appropriate steps to prevent any misconduct** by officers or employees of the company that could adversely affect the company's ability to pay all its debts; or
 - (c) the person is **taking appropriate steps to ensure that the company is keeping appropriate financial records** consistent with the size and nature of the company; or
 - (d) the company or the person is **obtaining advice from an appropriately qualified entity** who was given sufficient information to give appropriate advice; or
 - (e) the person is **developing or implementing a plan for restructuring** the company to improve its financial position.
 - **Carve outs**:
 - **Does not apply where**
 - **Employee entitlements are not paid on time** – defined in s596AA(2) super, long service leave, wage (**s588GA(4)(a)(i)**) **OR**
 - **Re Balmz** → not paid employee super

SCAFFOLD

1. **Work out relation-back date → s91 [SEE PAGE]**
2. **Any void transactions – need not Court order under s588FF**
 - a. **Circulating security interests within 6 months before relation-back day** (except for “new” money or liabilities) **s588FJ**
 - b. **Security interests granted to officers** (or associated persons) void if enforced (without the leave of court) within 6 months of the security being granted (**s588FP**)
 - c. **Vesting of PPSA security interests not registered on time** (s588FL)
 - d. **Vesting of unregistered security interest** (s267 PPSA)
3. **Any transaction that may qualify as voidable transactions?**
 - a. **Voidable transactions (defined in s588FE)**
 - i. **s588FF(3)) Time limit to bring action** – 3 years from relation-back date → Could seek extension from court
 - ii. **Important definitions**
 1. **Related entity (CA s9):** Promoter, director, relative of a director, director of a related corporation, related corporation itself and a beneficiary of a trust of which the company under examination is or has at any time been a trustee
 2. **Relative:** relative/spouse/director or member of a related body corporate
 - iii. **What is a transaction (s9)**
 1. **“transaction”**, in Part 5.7B, in relation to a [body corporate](#) or Part 5.7 [body](#), means a [transaction](#) to which the [body](#) is a [party](#), for example (but without [limitation](#)):
 - a. (a) a conveyance, [transfer](#) or other disposition by the [body](#) of [property](#) of the [body](#); and
 - b. (b) a [security interest](#) granted by the [body](#) in its [property](#) (including a [security interest](#) in the [body's PPSA retention of title property](#)); and
 - c. (c) a guarantee given by the [body](#); and
 - d. (d) a [payment made](#) by the [body](#); and
 - e. (e) an obligation incurred by the [body](#); and
 - f. (f) a release or waiver by the [body](#); and
 - g. (g) a loan to the [body](#);
 2. and includes such a [transaction](#) that has been [completed](#) or given effect to, or that has terminated.
 3. **Capital Finance Australia Ltd v Tolcher [2007] FCAFC 185 at [116]-[125]**
 - a. Facts: Capital finance provided Principal and Agency Agreement, LSE was agent for Capital Finance - entered into lease arrangements for equipments on behalf of principal.
 - i. Two directors arranged for consideration to be paid by
 - b. **Principles:**
 - i. Company must be a party to the transaction (at [117])
 - ii. Transaction may involve a series of events (at [120])
 - iii. Transaction is not limited to legally enforceable agreements
 - iv. The **whole of the circumstances must be examined** to identify the relevant transaction (Capital Finance at [120])
 4. **Badenoch** →
 - b. **Insolvent**
 - i. **Rule:** Unfair preferences or uncommercial transactions must also be insolvent transactions if they are to be clawed back under s588FF (Courts may make orders about voidable transactions, s588FG provides defences on grounds of not suspecting insolvency).
 - ii. **s588FC Insolvent Transactions:** A [transaction](#) of a [company](#) is an [insolvent transaction](#) of the [company](#) if, and only if, it is an [unfair preference](#) given by the [company](#), or an [uncommercial transaction](#) of the [company](#), and:
 1. (a) any of the following happens at a time when the [company](#) is [insolvent](#): **[Is insolvent when transaction occurred]**
 - a. (i) [the transaction](#) is entered into; or
 - b. (ii) [an act is done, or an omission is made, for the purpose of giving effect to the transaction](#); **OR**
 2. (b) the [company](#) becomes [insolvent](#) because of, or because of [matters](#) including: **[Becomes insolvent because of transaction]**

3. Making repayments under a loan taken out by directors: **Re Action Paintball Games Pty Ltd** (in liq) (No 2) [2015] FCA 1119
 4. Agreement by a company to become jointly liable for director's borrowings and to give a mortgage in support: **Vasudevan v Becon** Constructions (Australia) Pty Ltd [2014] VSCA 14 at [19]-[31]
- iii. **Gift/funding**
1. Giving away a valuable company asset to the son of one of the directors: **Slaven v Menegazzo** [2009] ACTSC 94 at [16], [29], [34],[38]
 2. Providing funds to purchase a boat for a 'close associate': **Weaver v Harburn** [2014] WASCA 227 at [91]-[97]
- e. **Creditor Defeating Dispositions s588FDB**
- i. **Requirements:**
 1. (1) A disposition of property of a company is a creditor - defeating disposition if:
 - a. (a) the consideration payable to the company for the disposition was **less than** the lesser of the following at the time the relevant agreement (as defined in section 9) for the disposition was made or, if there was no such agreement, at the time of the disposition:
 - i. (i) the market value of the property;
 - ii. (ii) the best price that was reasonably obtainable for the property, having regard to the circumstances existing at that time; and
 - b. (b) the disposition has the **effect of**:
 - i. **[Prevent Creditors be benefitted]** (i) preventing the property from becoming available for the benefit of the company's creditors in the winding - up of the company; or
 - ii. **[Hinder or delay]** (ii) hindering, or significantly delaying, the process of making the property available for the benefit of the company's creditors in the winding - up of the company.
 - ii. **Market value/best price reasonably obtainable**
 1. Less than market value or best price reasonably obtainable in the circumstances for the disposition (note also s 588FDB(2)) – sufficient to establish that consideration was less than both limbs: Re Intellicomms Pty Ltd (in liq) (No 1) [2022] VSC 228 at [228]-[235], [242]-[244]
 - iii. **Extensions of concept of disposition**
 1. **s588FDB(2) Creation of new property in third party** – Co do smt that results in another person becoming owner of property that did not previously exist.
 2. **S588FDB(3) Consideration (in whole or part) given to third party (not received by Co)** — Co taken to have made a disposition of the property constituting so much of the consideration as was given to the third party.
 - iv. **Disposition is voidable if (s588FE(6B)):**
 1. Company was insolvent at time of the transaction
 2. Company became insolvent because of the transaction
 3. Within 12mths of disposition the company enters external administration (liquidation, VA) as a direct or indirect result of the transaction
 - v. **Defence:** A defence is also available where disposition is part of a course of action qualifying for the 'safe harbour' insolvent trading defence (s 588FG(8))
 - vi. **Doesn't apply to actions by a liquidator, VA, SBRP, or under restructuring plan or a DOCA or scheme (s588FE(6B)(c))**
 - vii. **ASIC orders transfer of property s588FGAA**
 1. ASIC may make order if a creditor defeating disposition has occurred (s588FGAA)
 2. Order on application by a liquidator or on ASIC's own initiative
 - a. No need for court order (i.e. based solely on ASIC determination)
 3. ASIC may order **transfer of disposed property to company**, require payment of value of benefits received by transferee and/or require transfer of proceeds of property
 4. ASIC **may vary or revoke order** → BUT Court may set aside order on application of recipient of notice: s588FGAE
 5. Failure to comply with order is a **criminal offence**: s588FGAC
 - viii. **Officer duty to prevent a creditor defeating disposition s588GAB**

Deregistration

- **Pathways for deregistration:**
 - **Court can order deregistration (s480)**
 - **Voluntary deregistration (s601AA)**
 - Grounds under s601AA(2)
 - (a) all the [members](#) of the [company](#) agree to the deregistration; and
 - (b) the [company](#) is not carrying on business; and
 - (c) the [company's](#) [assets](#) are worth less than \$1,000; and
 - (d) the [company](#) has paid all [fees](#) and penalties payable under [this Act](#); and
 - (e) the [company](#) has no outstanding [liabilities](#); and
 - (f) the [company](#) is not a [party](#) to any legal [proceedings](#).
 - **Deregistration by ASIC (s601AB)**
 - Grounds under s601AB(1)-(2)
 - (2) [ASIC](#) may also decide to deregister a [company](#) if the [company](#) is being wound up and [ASIC](#) has reason to believe that:
 - (a) the [liquidator](#) is no longer acting; or
 - (b) the [company's](#) [affairs](#) have been **fully wound up** and a return that the [liquidator](#) should have [lodged](#) is at least 6 months late; or
 - (c) the [company's](#) [affairs](#) have been **fully wound up** under Part 5.4 and the [company](#) has no [property](#) or not enough [property](#) to cover the costs of obtaining a [Court order](#) for the [company's](#) deregistration.
 - Deregistration following winding up (or scheme) s601AC
- **Effect of Deregistration:**
 - **Company ceases to exist** (no longer a legal entity) and ASIC holds property on trust (or Cth for property held on trust by company) (s601AD)
 - Insurance contract may be claimed under (s601AG)

Reinstatement

- **Same process for court-ordered liquidations and voluntary liquidations** (Part 5A)
- **Voluntary reinstatement by ASIC (s601AH(1))**
 - If deregistration should not have occurred
- **Court reinstatement (s601AH(2))**
 - Application by "person aggrieved"
 - Court must be satisfied that it is just to reinstate
 - Court may make orders to validate actions done during period of deregistration (s601AH(3))
- **Effect:** Company reinstated taken to have continued in existence "as if not deregistered" (s601AH(5))
 - Directors are "reappointed", but not if their terms have expired
 - Court may make a winding up order over company once reinstated

WEEK 8: VOLUNTARY ADMINISTRATION

Part 5.3A ADMINISTRATION OF A COMPANY'S AFFAIRS WITH A VIEW TO EXECUTING A DEED OF COMPANY ARRANGEMENT

- **Purpose of Voluntary Administration: s435A CA** → is to [provide](#) for the business, [property](#) and [affairs](#) of an [insolvent company](#) to be administered in a way that: (*Blacktown City Council*)
 - (a) maximises the chances of the [company](#), or as much as possible of its business, continuing in existence; or
 - (b) if it is not possible for the [company](#) or its business to continue in existence--results in a better return for the [company's](#) [creditors](#) and [members](#) than would [result](#) from an immediate winding up of the [company](#).
 - **S435CA** does not 'exhaust' the considerations that may be taken into account (*Vero Insurance v Kassem*) – public interest is relevant (*Emanuele*), extra time for unpressured but reasonably prompt consideration of possible reconstruction possibilities (*Blacktown City Council*)
- **Outline of VA Process (Keay [19.20]-[19.25], [19.270], [19.50], [19.270],[19.400]-[19.410])**
 - **Appointment by:** (a) the **directors**, or (b) the **current liquidator**, or (c) a **secured creditor**
 - director appointment is most common (**s436A**)
 - **Two creditor meetings held within 8 and 25 (or 30) business days respectively**
 - 1st meeting (**s436E**) Appoint a COI and chance to change administrator; and

their removal. The chairperson may also decide not to use their casting vote, and then the deadlocked resolution is not passed.

PART 5.3B----RESTRUCTURING OF A COMPANY

- General

- **Cf liquidation:** “Debtor-in-possession regime” - **company continues in control of business, property and affairs – s453K**
 - Director can act in ordinary course of business or with permission of SBRP or the court – s453L
 - Ordinary course of business **does not include–** see Reg 5.3B.04 paying admissible claims or selling the whole or part of the business
- **Transactions may survive liquidation:** Transactions by SBRP, with permission of SBRP or with court leave can’t be set aside in liquidation – s453N
- **Goal** is to propose a **restructuring plan** to the creditors (voting 50% in value of those voting – Reg 5.3B.25)
 - Can involve debt compromise and/or deferment
 - **Related entity creditor votes don’t count** (see Reg 5.3B.25(2)(c) and definition of “excluded creditor” in Reg 5.3B.01)
 - **Deemed insolvent if plan put to creditors** (The plan is covered in the Regulations – see ss 455A and 455B, and Regs 5.3B.14 – 5.3B.29)
- Appointment of small business restructuring practitioner (SBRP or RP) by the directors - s453B
 - Board resolution that in the opinion (of the directors voting in favour) that the company is insolvent, or is likely to become insolvent at some future time
 - Company must be eligible
- Restructuring starts when SBRP appointed (entry into a plan ends the restructuring) – s453A
- **SBRP must be a registered (company) liquidator** - s456B (and not disqualified under s456C)

- Eligibility for SBR

- **To appoint a Restructuring Practitioner (s453C and Reg 5.3B.03)**
 - **Total Liabilities** - admissible debts or claims (see Reg 5.3B.01) - **must not exceed \$1m** (note employee entitlements excluded)
 - **Director eligibility:** No director (or former director in the last 12mths) has been a director of a company that has used restructuring or simple liquidation within 7 years prior
- **To propose a Restructuring Plan (see Regs 5.3B.14(1)(e) and 5.3B.24))** must at least substantially comply with:
 - Employee entitlements that are due and payable must be paid before putting a plan to creditors
 - Why not allow payments to be made up in the plan?
 - Tax lodgements need to be up to date
- **CANNOT if in VA/DOCA/LIQ etc –** Directors can’t appoint Restructuring Practitioner if the company is in VA, DOCA, liquidation or already in restructuring – s453B(2)
- **Declaration by Directors:** Directors must make declaration to SBRP on eligibility– **Reg 5.3B.49(c)**
 - Directors must make declaration that there have been **no voidable transactions** prior to the restructuring (if assumed commencement was the relation back day) - Reg 5.3B.49(b)

- Effect of restructuring

- Copies large portions of voluntary administration → **must set out in public docs** “restructuring practitioner appointed” (**s457B**)
- **Stay on most secured creditors, owners and lessors during restructuring (ss435R, 454B to 454L)**
 - Vesting of unperfected security interests will apply & not registered in time (ss267PPSA; s588FL CA)
 - Employee entitlements are not admissible debts
- **Stay on unsecured creditors and enforcement processes (ss435S, 435T)** power to adjourn a winding up application (s453Q)
- Ipso facto protections apply (s454N to s454S)
- **Why directors want this**
 - **Restructuring will not trigger director guarantees of company debt** (or guarantees of spouse or relative) (s453W)
 - Only applies during restructuring, not during the plan itself
 - Protection against insolvent trading during restructuring (new safe harbour – s588GAAB) so long transaction in ordinary course of business or with permission of SBRP or court
- **Restructuring lasts for 20bd + 15bd to vote (Reg 5.3B.16)**
 - Creditors vote remotely-not in a meeting

- iii) Plan Implementation;
 - Directors remain in control

WEEK 9 VOLUNTARY ADMINISTRATION II

Effect of VA

- **Effect on company (CA ss437A, 437B, 437D)**
 - **Labelling VA on public docs:** The company must include the words “administrator appointed” on all public documents unless the court permits otherwise (s450E)
 - **VA takes over the company’s business (s437A)**
 - While under administration, the administrator:
 - a) has control of the company's business, property and affairs;
 - b) may carry on that business and manage that property and those affairs;
 - c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and
 - **Constitution provisions do not limit power of sale by administrator (CA s437A) (Re Smith)**
 - d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.
 - **s 437A(1)(d) allows an administrator to exercise the power of the company or any of its officers to issue shares (Ezishop.Net Ltd (in liq) v Veremu Pty Ltd [2003] NSWSC 157 at [33])**
 - **Only the VA can deal with company property (s437D):**
 - **Transaction is void unless (a)** Administrator entered into the transaction on the company's behalf, **OR (b)** VA consent to it in writing before entering, **OR (c)** entered by court of the Court (**CA s437D(2)**)
 - **s437D(3) ADI Exceptions to subs(2):** does not apply to a payment made:
 - (a) by an Australian ADI out of an account kept by the company with the ADI; and
 - (b) in good faith and in the ordinary course of the ADI's banking business; and
 - (c) after the administration began and on or before the day on which:
 - (i) the administrator gives to the ADI (under subsection 450A(3) or otherwise) written notice of the appointment that began the administration; or
 - (ii) the administrator complies with paragraph 450A(1)(b) in relation to that appointment; whichever happens first.
 - **VA acts as agent of the company (s437B):** When performing a function, or exercising a power, as administrator of a company under administration, the administrator is taken to be acting as the company's agent.
 - **The administrator may agree to restrict their exercise of powers (FCT v Prescribing Biochemists P/L)**
 - Deeds of consent
- **Effect on directors and officers (CA ss198G, 437E, 438B, 438C, 440J, 442A)**
 - **Officers' powers are suspended (CA s198G):** While a company is under external administration, an officer of the company must not perform or exercise a function or power of that office (CA s198G(1))
 - **Exceptions:** Administrator may grant permission to exercise powers (CA s198G(3))
 - If there was an existing liquidator appointed, their powers are also suspended during the period of the VA (CA s198G(5))
 - **Directors may be removed or replaced by VA (CA s442A)**
 - **Administrator has management power (CA ss437A, 442A):**
 - TO take over company's business (CA s437A) or remove or replace directors (CA s442A)
 - **Defence against insolvent trading – since Co “frozen”:**
 - **Rule:** The action the [person] took in appointing administrator is a relevant factor to the defence in **s588H(5)** against **s588G** Insolvent Trading Liability (**s588H(6)**) [person took all reasonable steps to prevent the Co from incurring the debt or making the disposition of its property]. Other factors to s588H(5) defence include s588H(6)(b) when that action was taken and (c) the results of that action.
 - **Logic:** Once VA appointed, only VA could deal with Co affairs and property (s437D, s437A) → freeze → s588H(5) invoked.

prohibiting equipment being removed during VA and included term in sale contract that Debts could remove equipment at end of sale (if not purchased by the buyer)

- **Effect on secured creditors**
 - **General moratorium:** security interests cannot be enforced during the administration (**CA s440B**)
 - This **includes PPSA ROT Property (CA s435B)**
 - **“Enforce”:** entering into possession, or assuming control, of property of the company; appointing receiver; exercise of power of sale (**CA s9**)
 - **Exceptions to moratorium** [Same as owner/lessor rights]
 - **VA written consent or leave of court (CA s440B)**
 - For larger security interests, **security is over the whole or substantially the whole of the company property**, with action before or during the 13 business day decision period (CA ss9, 441A)
 - For smaller security interests, **if the secured party has taken action before appointment (CA s441B)**
 - If the security interest is over **perishable property (CA s441C)**
 - **Court order to limit powers of secured party (CA s441D)**, provided secured party interests are adequately protected (**Debris Re Strazdins**) – [See above]
 - **Secured creditor is not prevented from giving notice under security agreement (CA s441E)**
 - **Secured property in the possession of a secured creditor can be sold by the secured creditor (CA s441EA)**
 - **Excess in proceeds paid to VA** – Secured creditor can only retain the net proceeds of the sale equal or less than their debt (**CA s441EA(2)**)
 - **Circulating interest:** VA may continue to deal with circulating assets post appointment as if it were still a circulating interest (CA s442B)
 - **“Circulating security interest”:** PPSA security interest or a floating charge = grantor can still deal with it; it is not frozen for the term of the security (**CA s51C**)
 - **Secured assets (including PPSA & ROT): VA may deal with secured assets (e.g., **dispose** of them) in the ordinary course of business or with the secured party or the court’s approval (CA s442C(2)) (see also s442CB)**
 - **Court leave only granted if:** (3) The **Court** may only give leave under **paragraph (2)(c)** if satisfied that **arrangements have been made to protect adequately the interests of the secured party**, owner or lessor, as the case may be.
- **Effect on employees**
 - **VA does not automatically terminate employment**
 - Entitlements and rights continue
 - **VA may** choose to exercise the power to terminate employees (**CA s437A**)
 - **VA not personally liable for entitlements on termination**
 - Company remains liable
 - However, VA liable for new workers taken on during the administration (**CA s443A**)
 - **Some entitlements protected under liquidation and DOCA (CA s444DA)**
 - DOCA must contain a provision to the effect that, for the purposes of the application by the administrator of the property of the company coming under his or her control under the deed, any eligible employee creditors will be entitled to a priority at least equal to what they would have been entitled if the property in accordance with s556, 560, 561 (**CA s444DA**)
 - **Employees are creditors for outstanding entitlements** – **priorities per s556(1)** (see priorities above)
- **Effect on administrator**
 - **Administrator Liability**
 - **General debts:** VA is personally liable for debt incurred when acting as agent of the company (**CA s443A(1)**):
 - (a) services rendered
 - (b) goods bought
 - (c) **property hired, leased, used or occupied**, including property consisting of goods that is subject to a lease that gives rise to a **PPSA security** interest in the goods
 - (d) the repayment of money borrowed
 - (e) interest in respect of money borrowed
 - (f) borrowing costs
 - Subsection (1) **has effect despite any agreement to the contrary**, but without prejudice to the **administrator’s rights** against the **company** or anyone else. (**s443A(2)**)

- **[Best available return from sale] – McCallum** – ‘Arrangements “to protect adequately the interests of the secured party, owner or lessor” would ordinarily contemplate arrangements seeking to obtain the best available return for the property being disposed of and the payment of such amounts to the security interest holder, owner or lessor in a manner that is consistent with the principles found in Part 5.3A of the Act, recognising the prior interests of the security interest holder, owner or lessor as the case may be. If that cannot be achieved, the Court may not be satisfied that the condition stated in s 442C(3) can be fulfilled.’
- See also:
 - **[Breach of care] – THC Holding** – VA liable for damages under s1324(10) for breaching s442C
 - **Re Renovation Boys** – selling stock after notifying customers and suppliers
 - Court **allowed administrators to impose levy** for picking up their goods because they had to do inventory – no customers collected, just received funds from pooling.
 - **McCallum** – selling business where ownership of IP in software disputed
- **Power under s447A (get out of jail free card) – ‘it thinks appropriate’**
 - **Power to make orders (CA s447A):** The court may make such order as it thinks appropriate about how this Part 5.3A is to operate in relation to a particular company.
 - **Leading case: Australasian Memory v Brien**
 - **When can it be used:** s447A can be used even after the administration has come to an end – orders can still then be made about how Part 5.3A is to operate in relation to a particular company
 - Orders have prospective effect (though can be made in relation to past matters or events)
 - However, here court did not decide whether orders could or should be made to retrospectively alter accrued rights
 - **Broad power, not limited to curing defects**
 - **Is it appropriate for the particular Co?** ‘Clear enough that section s447A(1) is intended to empower the court to make orders which alter what would otherwise be the operation of Part 5.3A in relation to a particular company’ (**Brash Holdings v Katile**)
 - **A “nexus” is required between how Pt 5.3A is to operate in relation a particular company:** “it is necessary to identify the provision in Pt 5.3A the operation of which is to be modified and to articulate the proposed modification” (**Honest Remark v Allstate Explorations**)
 - Can’t be used to alter how provisions outside of Pt 5.3A are to work
 - **Correa v Whittingham** – s447A couldn’t be used to alter a provision of state legislation – this is not about how Part 5.3A is to operate but rather how a State law operates and would not be for a proper purpose
 - **Interdependent legislation may be altered:** It can be used to order that Part 5.3A operates so that a provision in Part 5.5 (for an annual meeting of members) does not apply in relation to a company going from Pt 5.3A administration into creditors voluntary liquidation (**Gibbons v LibertyOne**)
 - **CANNOT:** However, s 447A can’t be used make someone a creditor, who isn’t otherwise (**BE Australia WD Pty Ltd v Sutton**)
- **Examples**
 - **Procedural rules e.g. time limit/meeting form**
 - Extend the convening period (leading to the final creditors’ meeting) (**Re Riviera Group**)
 - Allow for electronic meetings during COVID-19 (**Strawbridge**)
 - **DOCA validation/termination**
 - Validate a DOCA (notwithstanding disputed matters) (**Re TLC Marketing Worldwide**)
 - Terminate a DOCA (by varying its terms to provide for automatic termination)
 - (**Re Centaur Mining**)
 - **Administrator appointment/termination**
 - Terminate an administration where the administrator was appointed for an **improper purpose** (see example in s477A(2))
 - (**Blacktown City Council v Macarthur Telecommunications**)
 - Appointing an additional administrator (**ASIC v McDermott**)
 - **Substantive variation of VA liability/application of IPS**
 - Vary the administrator’s personal liability (**Re Griffin Coal Mining**)
 - Enable Insolvency Practice Schedule to apply to other entities
 - (**Re University Co-operative Bookshop**)

- **What is a DOCA:** Document on execution effects a change in status of the company from under VA to under DOCA. Terms bind all creditors of the CO re claims arising on or before day specified in the DOCA under paragraph 444A(4)(i). Obligations stem from combined operation of the DOCA and the Law, not from any contractual bargain. Binding on all creditors, not just those voting in favor. (*MYT Engineering [25]*).
- **Potential uses of the DOCA:** Very flexible – remember the objects under Part 5.3A →
 - **s435A CA** → is to provide for the business, property and affairs of an insolvent company to be administered in a way that: (*Blacktown City Council*)
 - (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
 - (b) if it is not possible for the company or its business to continue in existence--results in a better return for the company's creditors and members than would result from an immediate winding up of the company.
 - Compromise debts and reduce debt burden (e.g., tax debts)
 - Sell off parts (or all) of the business
 - Allow viable parts of the business to be released from bad debts
 - Debt/equity swap o Pooling of group of companies
 - Holding DOCA to give the Deed Administrator time to work out what to do with the assets (Mighty River International)
 - i.e., enter DOCA for like a year, but creditors get nothing, just run business as normal so can extend the VA for long time
 - Implement a creditors' trust (and exit DOCA quickly e.g., ASX listed companies)
 - Transfer creditors' debts against the company into rights as beneficiaries under the trust
 - Quicker and easier to implement than a scheme of arrangement
 - Provides a better return than simply putting company into liquidation

Contents of DOCA

- **What must be contained in the DOCA?**
 - **CA s444A(4): provides that the DOCA must specify the following:**
 - (a) the administrator of the DOCA
 - (b) the property of the company (whether or not already owned by the company when it executes the deed) that is to be available to pay creditors' claims
 - Note: this can simply be 'no property'- e.g., for a 'holding DOCA (Mighty River International Ltd v Hughes)
 - (c) the nature and duration of any moratorium period for which the DOCA provides
 - (d) to what extent the company is to be released from its debts
 - (e) the conditions (if any) for the deed to come into operation
 - (f) the conditions (if any) for the deed to continue in operation
 - (g) the circumstances in which the deed terminates
 - (h) the order in which proceeds of realising the property referred to in paragraph (b) are to be distributed among creditors bound by the deed
 - (i) the day (not later than the day when the administration began) on or before which claims must have arisen if they are to be admissible under the deed
 - **The provisions in Corps Regs Sch 8A are also included in the DOCA by default but may be replaced: s444(5)** → i.e. excluded by provisions in DOCA
 - **Priority given to employee entitlements (CA s444DA):** The order of distribution for employee entitlements must be the same as in a liquidation, unless the employees at a separate meeting resolve to a different priority regime or the Court permits a different regime (subs(1),(2). Note s444DB regarding superannuation contributions.
 - **Rule:** Content of DOCA prima facie decided by majority creditors, would compromising debts or claims be better than Co to go into liquidation. Matter of commercial judgement, no reason [compelling] to confine the ambit of the terms and conditions (*Lehman*).
- **What cannot be contained in a DOCA? (*Lehman*)**
 - **Limited by reach:** A DOCA is, however, limited by the reach of the provisions in Part 5.3A as to who is bound by the DOCA and the respects in which they are bound (e.g., s 444B, s444G) (*Lehman*)
 - **CA s444D(1):** provides that a DOCA "binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed..."

- DOCA binds secured creditors, but cannot stop them enforcing their rights unless they have voted yes to the DOCA themselves [administration ended (s435C(2)(a)) therefore no s440B loses effect]
- **Protection of the company property and no winding up (CA s444E):** Protection of the company and its property from proceedings and no winding up whilst DOCA on foot brought by a person bound, save with DOCA administrator's consent or Court leave
- Note: the powers of the court under s447A to modify the operation of Part 5.3A
- **Effect of DOCA on members**
 - Upon execution of a DOCA the company is no longer 'under administration' (CA s435C(2)(a))
 - s437F no longer applies (which says members can't transfer shares)
 - Members are bound by DOCA (CA s444G)
 - **Shares**
 - Claims arising out of shares are subordinated, postponed until all other debts paid (**CA ss563A, 600H**)
 - The DOCA may involve a share issue (debt/equity swap) (**Re New Bounty**)
 - **DOCA may require existing shares to be transferred**
 - **CA s444GA** – Court may permit transfer “if it is satisfied that the sale would not unfairly prejudice the interests of the company's shareholders” and with written consent of share owners OR leave of court” (**Re Ten Network Holdings; Re Nexus Energy**)
- **Effect of the DOCA on lessors and owners**
 - **The DOCA will bind lessors and owners if they are creditors (CA s444D(1))**
 - They cannot make an application to wind up company, begin or proceed with proceeding against company or against any of its property or in relation to it except with leave of court and in accordance with terms court imposes (**CA s444E(3)**)
 - **The DOCA can “include” amounts due in the future (eg rent) (Lam Soon Australia; Henaford v Strathfield)**
 - **Ask: (1)** Did the owner/lessor vote in favour of the DOCA? (2) Did Court make order under s444F?
 - **If both NO → can enforce**
 - **Enforcement action re property rights allowed:** If **s444D(3)** applies (if they are not secured creditors i.e. just owner/lessor) or **s444D(2)** applies (if they are secured creditors) **except if they voted in favour of the DOCA OR if Court orders under s444E.**
 - **Order by Court to not enforce —** Court can order an owner not to take possession of or otherwise recover the property (either before (if resolution for DOCA passed) or after execution of a DOCA) if (**CA s444F(4); Strazdins**):
 - (a) for the owner or lessor to take possession of the property or otherwise recover it would have a **material adverse effect on achieving the purposes of the deed**; and
 - (b) the **interests** of the owner or lessor will be **adequately protected**.
- **Effect on secured creditors**
 - **Who are they**
 - Note: if they are secured creditors with unperfected PPSA security interests, then these interests will have vested in the company on administration (PPSA s267)
 - **“Secured creditor” (CA s51E):** creditor of the corporation, if the debt owing to the creditor is secured by a security interest
 - “Security interest” (CA s51A): either a PPSA security interest, or a charge, lien or pledge
 - **CANNOT WIND UP CO — Court action by secured creditor restrained by CA s444E:** They cannot make an application to wind up company, begin or proceed with proceeding against company or against any of its property or in relation to it except with leave of court and in accordance with terms court imposes (**CA s444E(3)**)
 - **PRIMA FACIE – Can deal with security interest so long did NOT vote in favour of DOCA nor s444F(2) order made by court (s444D(1), (2))**
 - **S444F(3): Order made only if** (a) material adverse effect on achieving the purposes of the deed (2) creditor interest adequately protected → having regard to terms of DOCA, terms of order, relevant matters.
 - **NB: S444D(2) does NOT extend to enforcement against after-acquired property by reference to the date a release under DOCA would take effect:** Preserves the creditor's property in its security interest, in respect of the property to which it was capable of attaching at the date a release under a DOCA would take effect.
 - BUT NOT – after-acquired property of the Co (**Re Bluenergy Group**)
 - **BUT — A DOCA can provide for the extinguishment of a secured creditor's debt which therefore “extinguishes” Secured party's right to deal with the security interest**

- **Relevant factors (non-exhaustive): Realistic prospect of better recovery by liquidation**, whether the possible “better return” is **substantially better, or only a little better**, than the return provided by the DOCA; **how much longer the return may take to realise** on a liquidation; and the **nature of the risks** to achieving that return in the particular case, such as the existence of **specific defences to a claim**, the **risks in obtaining funding** and uncertainties about foreign law.
- **Important (*Bidald*)**
 - Delay in bringing an application is important discretionary factor
 - Allowing an insolvent company to continue trading
 - Employment preservation, proper scrutiny of insolvent co and revealing potential contraventions
- **(1)(g) some other reason**
 - ***Bidald*** – Departures from the proposal in the final DOCA may come within ‘some other reason’
- **(2) whether the court should exercise its discretion to terminate a DOCA based on that ground**
 - **Onus on applicant seeking to have it set aside to prove these** (not on VA to prove sufficiency) (*Mediterranean Olives; Bidald*)
 - Court retain discretion even where grounds made out (*Bidald*)
 - **Consider:** Would setting aside the DOCA achieve any real benefits for creditors? (*DCT v Pddam*)
- **OUTCOME**
 - Court may declare a DOCA, or a part of it void or valid (CA s445G)
 - Court has broad scope for orders (CA s447A)

WEEK 11 RECEIVERSHIP

Overview

- **“Receiver”:** A Receiver is a person appointed to take possession of, get in, or recover property for the benefit of the person or persons entitled to it
- **Two ways of appointment:** A Receiver can be appointed in two ways:
 - **(1) Out of court appointment (main focus):** Appointment under a security to recover the secured money – appointment “out of court” by secured lender/creditor
 - **(2) Appointment by a court:** Court appointed (typically to preserve assets at risk) where ‘just or convenient’: Court approach with utmost care and caution (*NAB v Bond Brewing*)
 - “just or convenient” ground, eg:
 - Federal Court of Australia Act 1976 (Cth), s57(1); Supreme Court Act 1970 (NSW), s67; See also e.g. Corporations Act 2000 (Cth), s1323(1)(h)
 - Also, superior courts have inherent jurisdiction to appoint receivers
 - Receiver = officer of court.
- **Key definitions**
 - **Receiver (CA s416):** In Pt 5.2, CA includes a ‘receiver and manager’ in relation to property
 - Plain receiver does not manage property – buying/selling of the corp (*Re Manchester & Milford*)
 - **Receiver and manager (CA s90):** ‘A receiver of property of a body corporate is also a manager if the receiver manages, or has under the terms of the receiver’s appointment power to manage, affairs of the body.’. Note broad powers under s420
 - **Controller (CA s9):** ‘in relation to property of a corporation, means: (a) a receiver, or receiver and manager, of that property; or (b) anyone else who (whether or not as agent for the corporation) is in possession, or has control, of that property for the purpose of enforcing a security interest’
 - **Managing controller (CA s9):** a receiver and manager of property of a company, or ‘any other controller of that property who has functions or powers in connection with managing the corporation’
 - Modern day appointees – unless limited by the terms of appointment, any ‘receiver’ of a corporation will have statutory powers of management under s420.
 - **Mortgagee in possession:** Mortgagee enters possession directly.
 - Note: **receiver/controller is NOT an ‘external administrator’ (IPS (Corps) s5-15, s5-20)**
 - **IPS s90-15 will not apply** (Court cannot make order)
 - **Receivers of property of a corporation must be a registered liquidator (CA s418(1))** (so IPS Pt 2 (discipline provisions) applies to them)

- **Relief from liability (trespass) may be available to a receiver where the appointment invalid appointment (CA s419(3)):** where controller believed, on reasonable grounds, appointment valid. If sued, Court can relieve Receiver from liability (in whole or part) and transfer that liability to the person who made the appointment.
- **Challenging conduct of receiver**
 - Did receiver act within scope of authority?
 - Did receiver breach duties as an officer (ss 9; 180-183)?
 - Right to appeal from decision of controller or managing controller (s599)
 - Seek a statutory injunction (s1324)
 - Challenging power of sale (s420A – see below)
 - Power of the court to review conduct of receiver (s423) and to remove receiver (s434A; *Re Tomi-Sasha* regarding meaning of “guilty of misconduct” in s434A)

- **Overlapping appointments (receivership and VA)**

- **ALLPAP secured creditor may choose to appoint within the “decision period” (CA s441A)**
 - Must have enforceable security over the whole, or substantially the whole, of the company’s property (subs(1)(a))
 - **Secured creditor with less than this is bound by the stay (s440B)** subject to limited exceptions or court leave (or administrator consent)
 - E.g. A secured creditor may continue enforcement action if commenced prior to VA (CA s441B)
 - **Administrator’s power is subject to receiver & secured creditors (CA s442D)**
 - The Administrator must not dispose of property that is subject to security interests **unless** it is in the ordinary course of business or approval is given by the secured creditor or court (CA s442C)
 - **Court may limit the rights of the Receiver** to deal with secured property but only where the secured party’s rights are adequately protected (CA s441D) (and where there is a DOCA restrict the secured party’s rights under s444F)
- **Overlapping appointments are common**
 - Receiver conducts sale process while VA provides moratorium (e.g. *Re ABC Learning Centres (No 8)*)
 - Secured creditor/receiver will often fund (to some extent) the VA process

Effect of receivership

- **Effect on Co and management (Directors)**
 - **Receivership will supersede but not destroy company’s organs:** Directors no longer have authority to exercise ordinary business-management functions. (*Hawkesbury Development*)
 - **Reflect Receiver status on pub docs:** Company is to state that a receiver has been appointed on every public document (CA s428)
 - **Directors retain some powers to:**
 - Challenge appointment s418A(1))
 - Appoint administrator - unless a liquidator or provisional liquidator has been appointed (CA s436A(2))
 - Inspect records (CA s421(2))
- **Effect on contracts**
 - **Contracts remain on foot unless action taken to terminate them**
 - **Ipso facto clauses unenforceable:** Contractual rights triggered by appointment of 'managing controller' are stayed (CA ss434J-451M) (post 1 July 2018 contracts) (e.g., leases)
 - **Exceptions in Reg 5.3A.50:** There are certain contracts which are not subject to the stay (Reg 5.3A.50(2)) → e.g. contracts for the sale of a company’s business
 - **Certain contractual rights are also excluded** (Corporations (Stay on Enforcing Certain Rights) Declaration 2018) → e.g. increase interest rate, terminate 'standstill agreements', 'step-in' rights
 - **Subject to limited exceptions, a receiver has no personal liability if the company does not perform contracts.** Company may be in breach but a judgment for damages may be worthless (all assets held for the benefit of the secured creditor who appoints the receiver).
- **Effect of contracts which “bind” Receiver**
 - **'Post-receivership' contracts made by the receiver** and covered by s 419
 - **Contracts 'adopted' by receiver (*Re British Investments*)**

- (b) the Receiver has taken all reasonable steps to obtain the consent of the secured party in relation to the prior security interest to the sale or disposal, but has not obtained that consent; and
- (c) sale or disposal of the property under the order is in the best interests of the corporation's creditors and of the corporation; and
- (d) sale or disposal of the property under the order will not unreasonably prejudice the rights or interests of the secured party in relation to the prior security interest.
- **Power to seek directions from the court (CA s424):** Receiver may apply to the Court for directions in relation to any matter arising in connection with the performance or exercise of any of the Receiver's functions and powers
- **Conduct public examinations:** Receiver may be authorised by ASIC (as an "eligible applicant") to conduct public examinations (CA ss596A, 597)
- **Duties of receiver when selling property**
 - **Controller to take reasonable care (CA s420A(1))**
 - **Duty:** In exercising a power of sale in respect of property of a corporation, a controller must **take all reasonable care** to sell the property for (CA s420A(1)):
 - (a) if, when it is sold, it has a market value — not less than that market value; or
 - (b) otherwise — the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.
 - **Rule:** Provided all reasonable care taken, even if not at market value is fine.
 - **Mutually exclusive:** The 2 limbs of s420A are mutually exclusive (*Skinner v Jeogla*)
 - **Sale of land only allowed if mortgagee/chargee is allowed s115A(3) Conveyancing Act 1919 (NSW):** A receiver shall not exercise a power to sell any land the subject of the mortgage or charge unless the mortgagee or charge is entitled to exercise a power to sell the land
 - **Power of sale**
 - **Power of Sale:** Will be provided for under terms of security agreement OR provided in s420 (and under property law statutes)
 - Power is subject to equitable protections (i.e., bad faith) (*Downsview Nominees*)
 - There is no duty to wait to sell at the best time (*Expo International v Chant*)
 - **Statutory duty under s420A (see above)**
 - **For non-receiver controllers under PPSA s131:** A secured party who disposes of collateral under s128 (other than by purchasing the collateral) owes a duty, to any other person with a security interest in the collateral, and to the grantor, immediately before the disposal, to **exercise all reasonable care**
 - (a) if the collateral has a market value at the time of disposal--to obtain at least that market value; or
 - (b) otherwise--to obtain the best price that is reasonably obtainable at the time of disposal, having regard to the circumstances existing at that time.
 - **Conveyancing Act 1919 (NSW) s111A:** A mortgagee or chargee, in exercising a power of sale in respect of mortgaged or charged land, must **take reasonable care** to ensure that the land is sold for--
 - (a) if the land has an ascertainable market value when it is sold--not less than its market value, or
 - (b) in any other case--the best price that may reasonably be obtained in the circumstances.
 - **Onus on applicant alleging a breach of CA s420A**
 - **Rule:** Would a **reasonable and prudent person** (selling their own property) implement that sale process in the circumstances and having regard to appropriate expert advice including valuation advice [was all reasonable care taken to sell at market price] (*Fortson P/L; Boz One*). **High threshold & court need NOT decide the actual market price (Boz One).**
 - **NOT reasonable and prudent**
 - **Fortson P/L** → Bank offered hotel privately to one person cf it should have – open market and advertise for sale
 - Even if indeed market price achieved – if did not take care
 - **Key factor:** If price obtained at sale substantially below market value (*Boz One*)
 - **Mutually exclusive:** The 2 limbs of s420A are mutually exclusive (*Skinner v Jeogla*)
 - **Different views on whether a public sale is needed** (Re Australasian Barrister Chambers and Fortson P/L v CBA)

- **Practical steps (Fortson P/L; Boz One)**
 - Consider **nature of property** to be sold and any special qualities
 - Obtain **valuation** from appropriately qualified valuer – nature and qualities of property important when identifying valuer
 - Identify relevant market for property – again, expert advice
 - **Retain selling agent with experience** in relevant market
 - Undertake programme of **advertising** in that market making sure that sale brought to attention of prospective buyers, particularly where property has special or distinctive qualities
 - Identify method of sale which enables all prospective buyers to participate – particularly important where there is an **auction**
- **Duties**
 - The receiver must act strictly **within** his or her **appointment**
 - The receiver has a duty to the secured party to collect and realise the assets of the company for the purpose of discharging the security
 - **Officer of the company (CA s9) → ss180-184 duties** Court appointees are officers of the court
 - Exercise powers bona fide and for the proper purposes of their appointment (which can include a duty not to sacrifice the grantor's interests recklessly – though the appointor interests come first!)
 - Private receiver not a fiduciary to general creditors
 - **Prepare a report on company's affairs and lodge it with ASIC within 2 months (CA s421A)**
 - **Report to ASIC as soon as practicable if it appears that:**
 - a past or present officer may have been guilty of an offence, or
 - someone has misapplied or retained money/property of the company or may be guilty of negligence, default, breach of duty or breach of trust in relation to the company (**CA s422**)
 - **Paramount duty is to appointing creditor (for private appointment) (Expo International v Chant)**
 - Duty to account to appointing creditor and to preserve secured assets prior to sale
 - Duty to act within their stated powers

Termination of receivership

- **Completion of receivership:** Receiver lodges a form 505 **within 7 days of ceasing to act (CA s427(4))** – generally, a Receiver should retire and account to the company for any surplus once he or she is able to pay his or her appointor's debt and his or her remuneration and any properly incurred expenses or liabilities
- **Other reasons:**
 - **Misconduct - court termination (CA s434A)**
 - Removal by secured party/appointor
 - Resignation by Receiver (could be a breach of contract with the secured creditor if not permitted)
 - **Removal of a redundant Receiver by court (CA s434B)**
- **Effect:** Once the Receiver has ceased, the company continues to exist and control of property is returned to the directors, or otherwise to the Liquidator if one is appointed

WEEK 12 SCHEMES OF ARRANGEMENT

Overview

- **Schemes are regulated under Pt 5.1 Corps Act**
 - Main provision is s411 (approval)
 - s412 (explanatory statement)
 - s413 (amalgamation)
 - **Involves 2 court approvals:**
 - (1) Approval to hold creditor meeting and distribute explanatory statement
 - (2) Following approval by the creditors – court approval to implement scheme
 - Company need not be insolvent or in liquidation/VA to enter a scheme of arrangement
 - **When to apply?**
 - Locate at which tier of debt the business value is exhausted.
 - Only for business that are **economically viable, but just have debt problem**
- **Advantages of schemes**
 - Flexible content requirements
 - Up to the parties to determine

- Unfair or oppressive result
- Unreasonable time to consider scheme proposal
- **Court does not need to approval explanatory memo** → Defects can be addressed at final hearing
- **Step 5: Class composition – whom does the scheme bind? Is the creditor bound? Separate class?**
 - **When to raise:** Could be raised in first and second, twice.
 - **Rule:** Scheme binds class of creditors bound by it, third-party not bound unless they agree to be → scheme administrators normally sign a deed poll to be bound by the scheme of arrangement)
 - **“Class”:** Their rights not be ‘so dissimilar as to make it impossible for them to consult together with a view of common interest’ (*Dodd*). Distinguish interest v rights (*Re Opes*).
 - ‘the existence of separate commercial or other interests is not relevant to the class issue.’
 - **Rights v commercial financial interests test: (*Re Pacific Advisors*)**
 - (1) what are the rights which existing creditors (or members) have against the company and to what extent are they different.
 - (2) to what extent are those rights differently affected by the scheme (i.e. what would happen if there was no scheme or the scheme failed)
 - The context of the scheme is important (e.g., **comparing insolvency/liquidation with scheme**)
 - E.G. get <50c/\$ in VA; get more in scheme?
 - (3) does the difference in rights or different treatment of rights make it **impossible for the creditors (or members) in question to consider the scheme as one class.**
 - **No separate class required:** The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings (*Re Pacific Advisors*)
- **Step6: Implementing a scheme proposal**
 - **[A] Creditor approval**
 - **75% in value; simple majority in number (CA s411(4)(a)(i))**
 - These amounts based on ‘creditors, present and voting, either in person or by proxy’
 - Not based on all creditors who could participate
 - Subordinated creditors under s563A (i.e. members claiming creditor status) **do NOT vote (*Re Atlas Iron*)**
 - If vote determined by related entity then court may review (CA s415A)
 - **[B] Court approval at second court hearing**
 - Court will assess whether:
 - (1) **All requirements of CA s411 complied** with – procedure required under order for convening and holding meeting complied with
 - (2) Majority of creditors have acted in **good faith and for a legitimate purpose** – truly reflects views of creditors (*Re Jax Marine; Re Boart*)
 - (3) **Scheme proposal is** [a result of] **fair and reasonable** [decision by member of that class]
 - **Statutory majority prima facie evidence of fairness (*Re Boart*)**
 - **Reasonableness test:** Fair and reasonable by reference to an intelligent and honest man, who is a member of that class, acting alone in respect of his interest as such member might approve (*Re Alabama*). Cautious decision to decline to uphold proposal on ground of unfairness.
 - **Factors: (*Re Boart*)**
 - Adequacy of disclosure made to security-holders
 - Whether the proposed arrangement is contrary to public policy
 - **CANNOT:** No compromise — get nothing and give up everything, or be forced on the creditors (*Re Alabama*)
- **Step 7: Lodge Court order with ASIC (S411(10) CA)**

WORK OUTS – ALTERNATIVE TO LIQ/VA/RECEIVERSHIP

- **Informal reorganisation of debt relationship:**
 - Debt rescheduling (order and timing of payment)
 - Moratorium (standstill)
 - Debt restructuring (changing the nature of debt)
 - Need for new/more money

- **Depends upon voluntary agreement between major creditors and debtor** → consider effect on all creditors → lessors/owners, secured, employee creditors
- **Formal vs Informal**
 - **Formal:** Voluntary administration followed by DOCA and/or asset sale; Scheme of arrangement; May overlap with receivership
 - Advantages: Moratorium (stay); Court supervision/legal mandate; External controller appointed; Extensive powers (e.g., voidable trans, examination)
 - Disadvantages: Impact on business reputation; Ipso facto termination clauses
 - **Informal:** Workouts and debt restructuring
 - Advantages: Minimise disruption to business and adverse publicity; Preserve goodwill; Stakeholder driven; Limit ipso facto terminations; No court involvement; Lower costs (maybe)
 - Disadvantages: No moratorium; Limited by consent (vulnerable to holdouts); Lack of court/legal mandate; May delay inevitable

Why do workout?	A good workout candidate?
Preserve enterprise value <ul style="list-style-type: none"> - Avoid asset 'fire sales' - Sale as going concern - Complete work in progress Preserve jobs and tax revenue Maintain supply chains <ul style="list-style-type: none"> - E.g., car parts manufacturers Maintain competition o Less cost than formal workout (e.g. Scheme or VA/DOCA)	Financial vs economic distress Important issues: <ul style="list-style-type: none"> - Cash flows (historical and projected) - Position in product/service market - Quality of information flows - Liquidation/receivership analysis
Review Items	Parties in a workout
Realistic assessment of financial viability: <ul style="list-style-type: none"> - Investigating accountant, monitoring facility - Maintain integrity of information flows - Projected asset realisation values Review of key contracts: <ul style="list-style-type: none"> - Finance (covenant compliance, waivers, ability to bind all financiers) - Leases - Supplies - Asset management/IP licensing rights (eg Centro) Assess tax implications	<ul style="list-style-type: none"> - Coordinator (chief restructuring officer) - Steering committee (mainly banks) - Senior management - Lawyers (debtor, directors, creditors, committee) - Financial advisors

Legal Issues	
Debtor Company	Disclosure obligations, class actions
Directors	<ul style="list-style-type: none"> - Insolvent trading, liability for disclosure breaches - Personal guarantees - Reputational issues - Director duties (including acting in the best interests of the co, and the duty to consider creditor interests) - Shadow director risk → <u>Rule:</u> Does nothing a bank does not normally do in telling its customers what it requires if it is to continue banking facilities and leave the decision to the customer – is fine (<i>Millet J</i> in extra-curial paper) <ul style="list-style-type: none"> - DO NOT → replace the Co and do Co work e.g. approve cheques etc. – if shadow director then subject to director duties.

- Person seeking recognition for DIP was co sec (based in Aust)
- **US** – Delaware office is just a letterbox since Ch 11 filing records address as Melbourne
- **Ascertainable by objective third parties:** by reference to main interests which it still has and **facts within the public domain or so apparent** at the time of their occurrence (**Stanford**).
 - COMI requires **element of permanence (Moore)** → where the debtor conducts the administration of the debtor's interests on a **regular basis** and that is therefore ascertainable by third parties.
- **Relevant factors (Kapila (Beach J))**
 - the **location** where financing was organised;
 - the **location** of the debtor's principal assets or operations;
 - the **location** of the debtor's principal bank or other principal lender;
 - the **location** of the debtor's employees or agents;
 - the **location** of any administration, payroll, accounts payable or cash management activity relating to the debtor's business;
 - **NOT – Preparation of incorporation papers** by a 3rd party is not operations or economic activity for 'establishment' (**Legend**)
 - the **location** of any taxation authority relevant to the debtor's income from personal exertion and taxation thereon;
 - the **location** of the majority of creditors: one has to evaluate though the relative significance and weighting of variables such as number, value, whether secured or not, and whether present or future, certain or contingent in comparing the relative differences in two or more jurisdictions; only intuitive synthesis or impressionistic assessment rather than quantitative evaluation and precision may be practicable in evaluating the position as between two or more jurisdictions.

- **Foreign representative**

Key rights	Recognition
<ul style="list-style-type: none"> - Direct access to courts (Art 9) - Commence proceedings (Art 11) - Participate in proceeding (<u>upon recognition</u>) (Art 12) - Seek recognition (Ch III): <ul style="list-style-type: none"> - Foreign main proceeding <ul style="list-style-type: none"> - COMI - Foreign non-main proceeding <ul style="list-style-type: none"> - Establishment - Interim relief available (Art 19) - Foreign rep may seek orders under Art 21 - Foreign rep <u>may bring voidable transaction</u> action (Art 23) - Foreign rep may intervene in proceedings (Art 24) 	<ul style="list-style-type: none"> - Foreign rep may apply for recognition (Art 15) <ul style="list-style-type: none"> - Requirements for application (Art 15.2) - Presumption that debtor's reg office is debtor's COMI (Art 16.3) – unless contrary proof (note possibility of multiple reg offices: Legend) - Recognition if requirements in Art 17 satisfied - <ul style="list-style-type: none"> - <u>Recognition may be terminated if conditions cease</u> to exist (Art 17.3) - Recognised foreign rep must notify court of change of circumstances (Art 18) - Effect of recognition as a foreign main proceeding is same as appointment of liquidator (Art 20; CBIA s16) - Relief/orders that court may grant on recognition of main or non-main proceeding (Art 21) <ul style="list-style-type: none"> - Including <u>giving assets</u> for distribution to foreign rep <ul style="list-style-type: none"> - Astra → UK liq got assets to do one distribution; parri passu - Protection of interests: the interests of the creditors and other interested persons, including the debtor, must be adequately protected (Art 22) <ul style="list-style-type: none"> - Affected person may seek court modification or termination (Art 22.3) - Recognition of foreign main proceeding is <u>presumption of insolvency</u> (Art 31)

- **Foreign creditors: Key rights**

- Foreign creditors have **same rights to participate & commence proceedings as local creditors** (Art 13.1)
- **Priority:** Foreign creditors **not to be ranked lower than unsecured creditors** (Art 13.2)
 - Except tax and social security
- Foreign creditors entitled to **notice** (Art 14)
- **Seek modification or termination** of relief under Art 21 (Art 22.3)