

MLL318 CORPORATE INSOLVENCY LAW

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TOPIC ONE: CORPORATE INSOLVENCY AND EXTERNAL ADMINISTRATION

What is corporate insolvency?

Corporate = relating to corporations

Corporation (s 57A CA)

- Company
- Body corporate
- “Unincorporated body that ... may sue or be sued, or may hold property in the name of its secretary or [other] ... office holder ...”

Company (s 9 CA)

- Registered under the CA, etc

Insolvency = state of being insolvent

Insolvent (s 95A CA): not solvent; unable “to pay all the person’s debts, as and when they become due and payable”

- s 95 applies to both individuals and corporations. A person is insolvent if they cannot pay their debts “as and when they become due and payable.”

How is someone’s (in)solvency ascertained?

Focus on *ability*, not if chooses not to pay – a company that chooses not to pay is not necessarily insolvent.

- Essentially a cash flow test, but temporary illiquidity is not enough
 - *Sandell v Porter* (1966) 115 CLR 666, 670 (Barwick CJ): insolvency = an inability to pay debts as they fall due out of the debtor’s own money. But the debtor’s own are not limited to his cash resources immediately available.
- Temporary cash shortfalls may not indicate insolvency if future inflows (e.g., progress payments) are realistically available.
- Consider commercial realities: e.g., assured that someone will provide financial support?
 - *Chan v First Strategic Development Corporation* [43]-[44]:
 - Financial support need not be certain, but must be more than a mere possibility
 - Where support is from a party not legally obliged to provide it (e.g., director or related entity), the court must be satisfied that there is a sufficient degree of commitment and that the support is likely to continue.
 - Emphasises that commercial realities include informal supportive arrangements, but reliable evidence is needed to show they are adequate for solvency.
- Assets and liabilities matter: e.g., can sell assets or raise funds on their security
- Consider future and contingent debts
 - *Anchorage Capital Master Offshore Ltd v Sparkes* (2023) 111 NSWLR 304, [235]-[248]:
 - S 95A requires consideration of debts due in the immediate or reasonably near future, not just those currently due.

- A company may be insolvent now if it clearly cannot pay a future debt when it falls due.
- The further into the future the debt, the greater the certainty needed to prove present insolvency
- This is a fact-sensitive inquiry, depending on the company's business, known liabilities, and ability to realise assets or refinance.

CA s 459D – cash flow test also applies in winding up applications.

Signs of Insolvency

Some Indicia:

- Financial records incomplete or in disarray
- Trading losses / negative profits
- Low/no cash
- Unpaid taxes
- Unable to borrow on good terms
- Unable to raise more equity capital
- Suppliers demanding cash on delivery
- Late in paying creditors
- Part-payments to creditors
- Bounced cheques
- Letters of demand / statutory demands
- Warrants / judgments against the company

ASIC v Plymin (No 1) (2003) 175 FLR 124, [386 (Mandie J)]:

Humphris, an accountant called as an expert on behalf of Elliott, agreed that a checklist of matters put to him as being indicators of insolvency, was a fairly extensive list, albeit in general terms, and brought to mind very common features in insolvency situations. The list may be paraphrased as follows:

"1. Continuing losses. 2. Liquidity ratios below 1. 3. Overdue Commonwealth and State taxes. 4. Poor relationship with present Bank, including inability to borrow further funds. 5. No access to alternative finance. 6. Inability to raise further equity capital. 7. Suppliers placing [company] on COD, or otherwise demanding special payments before resuming supply. 8. Creditors unpaid outside trading terms. 9. Issuing of post-dated cheques. 10. Dishonoured cheques. 11. Special arrangements with selected creditors. 12. Solicitors' letters, summons[es], judgments or warrants issued against the company. 13. Payments to creditors of rounded sums which are not reconcilable to specific invoices. 14. Inability to produce timely and accurate financial information to display the company's trading performance and financial position, and make reliable forecasts."

Cash Flow Test Application in Exam Problem Questions

1. Identify unpaid current debts: suppliers, rent, tax.
2. Identify future debts imminently falling due
3. Assess liquidity of assets: can they be turned into cash quickly? (perishables unlikely)
4. Consider access to reliable financial support
 - Is the support legally binding or practically assured? (*Chan v First Strategic*)
5. Look for indicia from *ASIC v Plymin*: unpaid creditors, lack of cash, inability to borrow, etc.
6. Draw a conclusion: temporary illiquidity or actual insolvency?

What is “Corporate Insolvency”?

Corporate

- Company
- Body corporate; or
- Some unincorporated bodies

+

Insolvency

- Unable to pay one's debts as and when they fall due

=

Corporate Insolvency

Purposes of Corporate Insolvency

Punishment: torture, death

1 James I C 15 (1604):

“Now, perjury of a Bankrupt, whereby Creditors suffered a loss to the extent of £10, was made indictable, and on conviction the Bankrupt was subjected to the picturesque punishment of standing in the pillory for the space of two hours, and of having one of his ears nailed to the pillory and cut off.”

4 Anne c 17 (1705) in 1 James I C 15 (1604):

“To the recalcitrant and fraudulent Bankrupt no mercy was shown, the Bankrupt who failed to surrender and make full discovery, or who concealed property, being punished with death.”²

Punishment: imprisonment

Victoria today:

- If have a cause of action for ≥\$50,000 and “there is probable cause for believing that the defendant [will] ... remove out of Victoria”, might still be able to obtain an order for their arrest and imprisonment (*Supreme Court Act* s 87).

Discharge of debtors

Harmer Report – Aims of Insolvency Law

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/ALRC/1988/45.html>

On 20 November 1983, the Law Reform Commission was asked to investigate the law and practice relating to personal and corporate insolvency. The Commissioner-in-charge was Mr Ronald W Harmer.

According to the 1988 ‘Harmer report’, **the aims of insolvency law are as follows:**

- “to provide a fair and orderly process for dealing with the financial affairs of insolvent individuals and companies”;
- to “provide mechanisms that enable both debtor and creditor to participate with the least possible delay and expense”;
- for “insolvency administration” to “be impartial, efficient and expeditious”;
- Gather assets for distribution to creditors:
 - to “provide a convenient means of collecting and recovering property that should properly be applied toward payment of the debts and liabilities of the insolvent person”;
- Distribute assets fairly among creditors:
 - for “[t]he principle of equal sharing between creditors [to] ... be retained and in some areas reinforced”;
- Discharge the debtor:
 - for “insolvency administration” to result, “particularly as it affects individuals, ... with very limited exceptions, [in the] ... effective relief or release from the financial liabilities and obligations of the insolvent”;
- “so far as it is convenient and practical, [to] support the commercial and economic processes of the community”;

- “[a]s far as is possible and practicable, [to] ... harmonise with the general law”; and
- to “enable ancillary assistance in the administration of an insolvency originating in a foreign country”.

Purpose of Bankruptcy Law

Hill J in *Re McMaster* (1991) 33 FCR 70 held that modern **bankruptcy law** seeks to:

1. Rateable distribution of insolvent debtor’s assets among their creditors;
2. Prevent any of the creditors from obtaining an unfair advantage over the others; and
3. Discharge the insolvent debtor from existing liabilities to creditors
 - “fresh start” (or “clean slate”) policy

Purpose of Corporate Insolvency Law

He first two purposes of bankruptcy law (above) are also the purposes of corporate insolvency law

- E.g., “One of the fundamental precepts of corporate insolvency law is that the available assets of the company are to be shared rateably among its creditors.”

But corporations are “**legal fictions**... that exist only because the law says they do” ([P.A. Keane AC](#))

- So do corporations, not being human, need discharge and/or a fresh start?

Fresh Start for Corporations? Harmer report

The Harmer report relevantly explains:

“A basic aim of insolvency law is to deal comprehensively with all of the debts and liabilities of the insolvent. In the case of an individual insolvent, [this is] ... so that the insolvent can make a fresh start. This reflects the rehabilitative aim of insolvency law. In the case of a company, [this is] ... so that its affairs can be fully wound up or so that it can resume trading.” (315 [774])

When discussing the proposed regime that is now embodied in Part 5.3A of the CA:

“The object is to deal with the financial affairs of a company in such a way that its debts and liabilities will be extinguished. ... [A]ll debts and liabilities which cannot be satisfied from the funds to be distributed under the arrangement must be discharged by release or capitalisation.” (32-33 [58])

Fresh Start for Corporations? Case Law

***Brash Holdings Ltd v Katile Pty Ltd* [1996] 1 VR 24, 28 (Brooking, Phillips and Hansen JJ)**

“The appellants relied upon the purpose of [a Pt 5.3A mechanism] ... as being to resolve, once and for all, the financial position of the company ... in order to allow the company a fresh start for the future. ... [W]e think that the submission made by counsel for the appellant is to be preferred ...”

***Blacktown City Council v Macarthur Telecommunications Pty Ltd* (2003) 47 ACSR 391, [19] (Barrett J)**

“The provisions [in Pt 5.3A] ... show that there is a purpose of allowing ... a legacy of debt [to] ... be left behind and winding up [to] ... be avoided.”

***Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd* (2015) 106 ACSR 79, [218] (Newnes and Murphy JJA)**

“The purpose of giving the insolvent a “fresh start” is ... implicit in the statutory scheme in Pt 5.3A ...”

What is external administration?

Chapter 5 and Schedule 2

Chapter 5 of the CA is titled “External Administration”

- arrangements and reconstructions (Pt 5.1)
- controllers, incl. receivers (Pt 5.2)
- administrations and deeds of company arrangement (‘DOCAs’) (Pt 5.3A)
- restructurings and restructuring plans (Pt 5.3B)
- winding up (Pts 5.4 to 5.7)
- recovering property (Pt 5.7B)
- offences (Pt 5.8), etc

Schedule 2 to the CA is titled “Insolvency Practice Schedule (Corporations)”

- Sometimes referred to as ‘IPSC’
- Has effect by virtue of CA s 600K

The object of Sch 2 includes to “regulate the external administration of companies”:

- “consistently”, generally; and
- “to give greater control to creditors.”

What is “external administration”?

CA Sch 2, s 5-15

- Pt 5.3A
 - Administrations
 - DOCAs
- Pt 5.3B
 - Restructurings
 - Restricting plans
- Pt 5.4 to 5.7
 - Liquidations
 - Provisional liquidations

Who are “external administrations”?

CA Sch 2, s 5-20

- Pt 5.3A
 - Company Administrators
 - DOCA administrators
- Part 5.3B
 - Company restructuring practitioners
 - Plan restructuring practitioners
- Part 5.4 to 5.7
 - Liquidators
 - Provisional liquidators

Officers and/or external administrators

	Officers of company? *	External Administrators?
Scheme Administrators	✓	✗
Receivers; receivers and managers	✓	✗
Other controllers	~	✗
Administrators	✓	✓
Restructuring Practitioners	✓	✓
Liquidators	✓	✓
Provisional liquidators	~	✓

*CA s 9AD(1) ('officer' of a corporation other than a CCIV)

Officers

~ Because *may* be officers, depending on the facts.

An **officer** also includes:

- All **directors**, all secretaries; and
- Anyone:
 - “who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation”; or
 - “who has the capacity to affect significantly the corporation’s financial standing”; or
 - “in accordance with whose instructions or wishes the directors of the corporation are accustomed to act” (excluding advice due to business relationship or as a professional).

CA s 9AD(1) ('officer')

Officers and External Administrators

CA s 9AD – “Officer” includes:

- Directors and secretaries
- Anyone who:
 - makes decisions affecting a substantial part of business
 - can affect financial standing
 - whose instructions directors follow (excluding professional advisers)

Overlap:

- Administrators, restructuring practitioners, liquidators = often both officers and external administrators
- Scheme administrators, receivers = officers but not external administrators
- Provisional liquidators = sometimes both depending on control

Officers during external administration – CA s 198G

CA s 198G

Is the company under external administration?

No: officers (e.g., directors, secretaries, scheme administrators, receivers, receivers and managers) **continue to act**

Yes: officers (e.g., directors, secretaries, scheme administrators, receivers, receivers and managers, administrators, restructuring practitioners, liquidators) must not act *unless*.

- The officer **is** the external administrator (e.g., administrators, restructuring practitioners and liquidators)
- The officer is permitted to act by the external administrator **or** a court **or** the CA
- The company is subject to a DOCA
- The company is under restructuring or has made a restructuring plan

Penalty Units

If an offence is committed under the CA, maximum penalty units might be fixed

- See, e.g., CA Sch 3

One penalty unit is \$330 “subject to indexation”

- *Crimes Act 1914* (Cth) s 4AA(1)

Validity despite defect/irregularity

CA s 600J(3) with (4)

If **dispose** (or permit disposal) of property, incl. payment of money, to an external administrator without knowing of the defect/irregularity with the winding up or the external administrator’s appointment, will “be protected and indemnified”.

CA s 600J(1)

External administrators’ acts “are valid despite any defects that may afterwards be discovered in” their appointment or qualification.

CA s 600J(2) with (4)

If acquire company property (incl. its money) “in good faith and for value and without actual knowledge of the defect or irregularity” with the winding up or the external administrator’s appointment, the disposition by the external administrator is valid.

Essential Services

- Receiver; or
- Receiver and manager; or
- External administration;

may request the supply of an essential service (electricity, gas, water telephone/internet) to the company

although “the company owes... the supplier” since before their appointment

“the supplier must not”:

- **refuse** to supply only because an amount is owing; or
- “make it a condition of the supply ... that the amount is to be paid”

CA s 600F

Unperfected PPSA security interests

CA s 9

- **PPSA security interest** means most interests to which the [Personal Property Securities Act 2009](#) (Cth) (‘PPSA’) applies

PPSA s 12(1)

- i.e., “an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation”

PPSA s 267

PPSA s 21

CA s 588FL: If a PPSA security interest in a company’s property is registered on the PPSR <6 months before the start of external administration (except prov. liq.), and not ≤20 business days of the security agreement’s effect, that security interest may vest in the company

CA s 588FN

CA s 588FM

CA s 588FO

Court and Creditor Powers

CA Sch 2, s 90-15

A court can “make such orders as it thinks fit in relation to the external administration of a company”:

- “on its own initiative” or on application (see CA Sch 2, s 90-20)
- including an order, for example:
 - “determining any question arising in the external administration”;
 - “that a person cease to be the external administrator”;
 - appointing “another registered liquidator ... as the external administrator”;
 - regarding “the costs of an action (including court action) taken ... in relation to the external administration”;
 - regarding “any loss” to the company “because of a breach of duty by the external administrator”; and
 - regarding remuneration of the external administrator.

CA Sch 2, s 90-35

- Creditors may resolve at a meeting to replace an external administrator.
- But a removed external administrator may apply to court for reappointment if this “was an improper use of the powers of one or more creditors”.

Data Regarding Company Insolvencies In Australia

Companies and Businesses

- Since February 2022, there have been >3m registered companies in Australia
- In May 2025, there were 3,538,593 registered companies in Australia

+

- At 30 June 2023, there were 2,589,873 actively trading businesses in Australia
- However, only 1,094,465 of these businesses were run by private-sector companies
- Other businesses operated as trusts, partnerships, sole proprietors, etc

=

- Most registered companies in Australia do not operate *any actively trading business!*

It appears that carrying on a business under the CA might not require “active trading”:

- A business need not:
 - be carried on for profit (CA s 18)
 - be carried on alone (CA s 20)
- A company may be carrying on a business if it:
 - Establishes or uses “a share transfer office or share registration office in Australia” (CA s 21(2)(a))
 - deals with “property situated in Australia... as an agent, legal personal representative or trustee” (CA s 21(2)(B))

CA s 21(3): A company is not carrying on a business “merely because” it engages in certain specified activities, which include:

- holding property;
- maintaining a bank account;
- investing funds;
- securing or collecting debts;
- holding meetings;
- being involved as a party in litigation;
- conducting isolated **transactions**

However, several of these, may be carrying on a business (e.g., *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2019) 369 ALR 192, [15])

Company Insolvency Statistics in Australia

ASIC publishes company insolvency statistics

Series 1 –

- number of companies in respect of which a relevant appointment was made in a given period (as only counts the first appointment to a given company in that period)¹

Series 2 –

- number of relevant appointments made in a given period, noting that a single company may have multiple appointments¹

Series 3 – ETC

Series 1 and Series 2 Appointments

The appointments covered by ASIC’s Series 1 and Series 2 are Chapter 5 appointments:

- *Controllers*
 - Scheme administrators
 - Receivers
 - Receivers and managers
 - Managing controllers
 - Other controllers
- *External Administrators*
 - Liquidators (except members’ voluntary liquidation)
 - Provisional liquidators

- Administrators (of companies and of DOCAs)
- Restructuring practitioners (of companies and of plans)

Problems with Series 1 and Series 2

1) Do not include *all* insolvent companies

- Only companies affected by a relevant appointment are included
- So exclude insolvent companies which, for example:
 - are simply abandoned; or
 - are saved by an informal work-out.

2) Include some *solvent* companies too

- Not all relevant appointments require the affected company to be insolvent
- So include companies which, for example:
 - are likely to become insolvent in the future (sufficient for administration and restructuring); or
 - are being wound up (not via a members' voluntary liquidation) even though they are not insolvent.

Formal Insolvency is Rare

Corporate insolvencies

- In June 2023, there were 3,227,484 companies registered in Australia¹
- But in 2022/23, relevant appointments were only made in relation to 7,942 companies²
- So only around 0.25% of Australian companies experienced a relevant appointment in 2022/23

Personal insolvencies

- As at 31 December 2022, Australia's population was around 26,268,359 people³
- But in 2022/23, there were 9,930 personal insolvencies⁴ under the Bankruptcy Act 1966 (Cth)
- So around 0.04% of Australian people experienced a relevant process in 2022/23

Series 3

- When a Series 3 report was lodged for 2022/23:
 - insolvent trading was typically alleged
 - and if so, insolvency typically began >1 year before the appointment
- typically, the company's estimated:
 - liabilities were >\$250,000 and <\$1 million;
 - realisable assets were ≤\$10,000; and
 - deficiency was >\$250,000 and <\$500,000
- the company typically had:
 - <5 full-time equivalent employees; and
 - no unpaid wages, etc.
- When a Series 3 report was lodged for 2022/23, **typically** the company owed:
 - *nothing* to secured creditors;
 - something in taxes and/or other statutory debts; and
 - >\$100,000 was owed **typically**
- something to unsecured creditors
 - >\$100,000 but ≤\$250,000 was owed **typically**
 - yet **typically** they received *nothing*

TOPC TWO: ADMINISTRATIONS

Commencement of Administration

Background

Before Pt 5.3A we had “official management”:

- directors would resolve that the company was insolvent, and a meeting of creditors would be convened to decide whether to proceed with official management
 - debts had to be fully paid within a certain period, else the company would be wound up
 - an “impossible ideal” that was “rarely used”

Official management failed because the requirement to fully pay debts in a short period was unrealistic.

Introduction of Pt 5.3A

- replaced official management

Corporations Law Reform Act 1992 (Cth) s 56

- enacted to implement a Harmer report recommendation
- the ‘as enacted’ version came into force on 23 June 1993
 - now approximately 32 years old as of 2025
- Pt 5.3A provides for 2 mechanisms:
 - administration; and
 - DOCAs

CORPORATIONS ACT 2001 - SECT 435A

Object of Part

The object of this Part, and Schedule 2 to the extent that it relates to this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

- (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.

Note: Schedule 2 contains additional rules about companies under external administration.

This aims to allow time for reconstruction options and provide better outcomes for creditors than immediate liquidation.

Beginning Administration

Administration begins with an appointment of a company administrator

CA s 435C(1)(a)

	Appointer	How Appoints?
CA s 436A	Company (via board of directors)	By writing, if board resolves that in its opinion the company is insolvent or likely to become so in the future, and an administrator should be appointed
CA s 436C	Creditor with a security interest over (/substantially) all of the company's property	By writing, if security interest is enforceable (and perfected if PPSA security interest)

CA s 436B	Liquidator or provisional liquidator	By writing, if thinks that company is insolvent or likely to become so in the future
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Important:

- **CA s 436D:** An administrator cannot be appointed under ss 436A, 436B, or 436C if the company is already under administration.
- Secured creditors also cannot appoint an administrator under s 436C if a provisional liquidator is in office (CA s 436C(2)).

Invalidity

CORPORATIONS ACT 2001 - SECT 447C

Court may declare whether administrator validly appointed

- (1) If there is doubt, on a specific ground, about whether a purported appointment of a person as administrator of a company, or of a deed of company arrangement, is valid, the person, the company or any of the company's creditors may apply to the Court for an order under subsection (2).
- (2) On an application, the Court may make an order declaring whether or not the purported appointment was valid on the ground specified in the application or on some other ground.

If there is a **specific ground** for **doubting the validity** of a purported appointment of a person as a company/DOCA administrator:

- The company;
- Any of its creditors; or
- That person;

May **apply to court**, and the court may declare whether it was valid or not – on any ground.

Grounds for challenge may include improper purpose, defective formalities, or lack of genuine insolvency opinion.

Kazar v Duus (1998) 88 FCR 218, 233-244

- An appointment made without a concluded opinion on insolvency, or for improper purposes, will be invalid.
- Improper purpose includes appointment to avoid scrutiny or frustrate legitimate creditor claims.

ASSESSING ADMINISTRATOR APPOINTMENT:

- Who made the appointment? director → s 436A; liquidator → s 436B; secured creditor → s 436C);
- Was the company insolvent or likely to become insolvent?
- Proper written instrument of appointment
- That no prior administrator or restructuring practitioner is in place
- Directors must pass a valid resolution under s 436A confirming insolvency or likelihood thereof

Administrators

Company/DOCA Administrators

A **company/DOCA administrator** must:

- consent in writing to the role; (CA s 448A)
 - note: consent can be withdrawn before appointment but not after
- be a **registered liquidator**; and (CA s 448B)

subject to court leave, must not be in any of the specified relationships with the company (e.g., “director, secretary, senior manager or employee”, auditor, creditor for >\$5,000, etc (CA s448C)

an appointment as administrator is irrevocable

≥2 persons may be appointed and act as administrator

Company Administrator’s Role and Power

CA s 437B: Is agent of the company when acting in that capacity

CA s 437A(1): “has control of the company’s business, property and affairs”, and may:

- carry on, terminate and/or dispose of the company’s business in whole/part;
- manage and/or dispose of any property of the company; and
- do whatever company officers could have done but for the administration

CA s 442A(a)-(b): May remove/appoint directors

CA s 442A(c): may “execute a document, bring or defend proceedings, or do anything else in the company’s name and on its behalf”

CA s 442A(d): may do “whatever else is necessary for the purposes of” Pt 5.3A

Actions, payments, and transactions -> Dealings with Property

CA s 442C: Company/DOCA administrator may, “in the **ordinary course** of the company’s business”, or with **written consent** of owner/secured party, or **court leave**, **dispose** of property that is used/occupied by the company, or is in the company’s possession, or which is subject to a security interest

CA s 442CB: “must act reasonably in exercising a power of sale” if subject to security interest

CA s 451C: If there was:

- a **payment** made;
- a **transaction** entered into; or
- any **act** or **thing** done;

“in **good faith**, **by**, or **with the consent** of, the **administrator**”, it is:

- “valid and effectual”; and
- “not liable to be set aside in a winding up”

Liabilities of Company Administrators

CA s 443A: Administrators are liable for the **debts they incur in that role** (but might have rights against the company/others)

CA s 443B: Also “liable for... **rent** or **other amounts payable by the company**” to the **owner/lessor** of property “as is attributable to a period” when the company is under administration and using, occupying or possessing that property from >5 business days after administration begins, except:

- while a **notice given within 5 business days** and stating “that the company does not propose to exercise rights in relation to the property” is in force – such notice is revocable in writing or if rights exercised (e.g., property is used)
- while a **secured party/controller is responsible** for the property
- while a **court order “excuses** the administrator from liability”

but the company's liability is not affected by these exceptions

Indemnity of Company Administrators

CA s 443D: Administrators are normally "entitled to be indemnified out of the company's property" for:

- debts, damages, losses, etc, for which they are liable in that capacity; and
- for their remuneration

CA s 443E: takes priority over unsecured debts, etc

CA s 443F: secured by a lien on company's property

CA s 9: "*security interest*" means:
(a) a PSSA security interest; or
(b) a charge, **lien** or pledge.

Secured creditors with perfected security interests have priority over administrators' liens.

Replacing Company Administrators

CA s 449C(6): If a company is under administration but "**no administrator is acting**", the Court may appoint a person as administrator on the application of **ASIC** or of an **officer, member** or **creditor**"

CA s 449C(1): If a company administrator:

- resigns by written notice,
- "becomes prohibited from acting", or
- dies

their appointer may appoint someone else to take their place.

CA s 449C(3) and (7): If appointer was the company (under CA s 436A), the new appointment must be made by board resolution.

CA s 449C(4): Unless appointer was a court, creditors must be given the chance to replace the replacement administrator

Recall CA Sch 2:

- court may order as it thinks fit (CA Sch 2, s 90-15)
- creditors may replace administrator (CA Sch 2, s 90-35)

Effects of Administration

*Employees employed after appointment must be paid. Pre-appointed entitlements are unsecured debts.

- Public disclosure require: CA s 450E
- Court must adjourn winding up/provisional liquidation if administration is preferable: CA s 440A(2)-(3)
- Stay on proceedings and enforcement: CA ss 440D, 440F
- Transactions/alterations may be void

Effects on the Company

While a company is under administration:

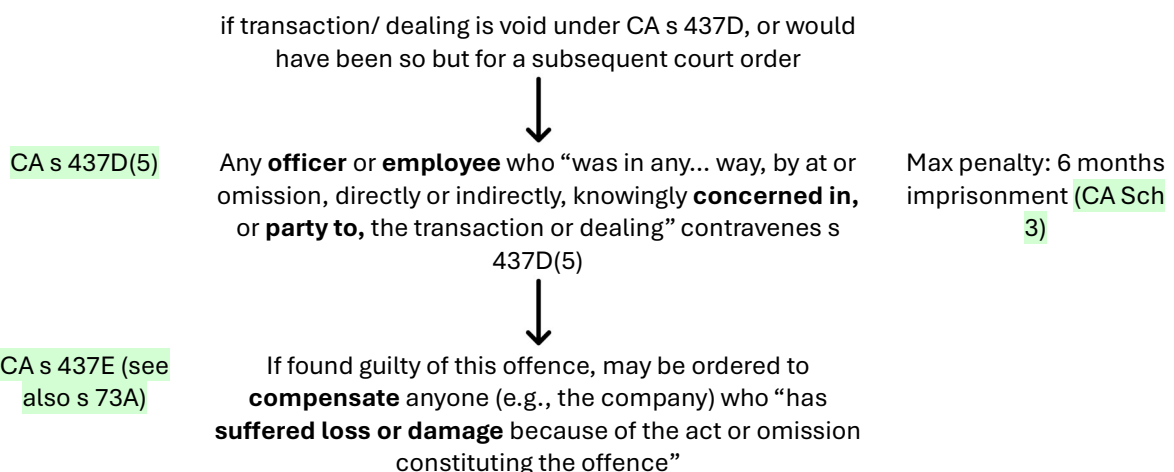
- the company must state in public documents and negotiable instruments after its name first appears: “(administrator appointed”): CA s 450E(1)
- A court must **adjourn the hearing of a winding up application** if satisfied that administration is more in the interests of creditors than winding up: CA s 440A(2)
- A court must **not appoint a provisional liquidator** if satisfied that administration is more in the interests of creditors than provisional liquidation: CA s 440A(3)
- No one may begin/continue “**enforcement process** in relation to property of the company” without **court leave**: CA s 440F
- No one may begin/continue **court proceedings** “against the company or in relation to any of its property” unless they have “the **administrator’s written consent**” or **court leave**, or the proceeding is **criminal** or prescribed: CA s 440D
- CA s 437F: Transfer of shares and alteration the status of members are void unless:
 - made in accordance with administrator’s written consent; or
 - authorised by court order
- CA s 437D: Transactions and dealings by, or on behalf of, the company which affect its property are void unless:
 - It was entered into under a court order;
 - The administrator entered into it on behalf of the company, or gave prior written consent for it;
 - A subsequent court order results in it not being void; or
 - etc

Effects on Officers and Employees

CA s 440J: During administrator, “a guarantee of liability of the company cannot be enforced, as against... a director” or their spouse or relative without court leave.

Recall CA s 198G!

→ officers essentially suspended during external administration, with some exceptions



Effects on Owners and Secured Parties

Who?	What?	Exceptions/elaborations
Secured creditors generally	Cannot enforce security interest (but may continue in possession if possessory security interest)	unless acting with: administrator’s written consent; or

Owner of property used/occupied by the company	Cannot take possession, recover it, or enforce any security interest that have in the property, and no distress for rent	court leave CA s 440B
Someone with security interest(s) in all, or substantially all, of the company's property	May start and finish enforcing all of their security interest(s) before or during the decision period CA s 441A	“decision period” is from when notice of appointment was given (else when administration began) until end of the 13 th business day after that day CA s 9 (‘decision period’)
Someone with a security interest in perishable property of the company	May enforce security interest CA s 441C	Subject to court order CA s 441D
Someone with a security interest in the property of the company	May continue enforcing security interest if began enforcing it before administration began CA s 441B	
Someone owns perishable property used/occupied/possessed by the company	May take possession or otherwise recover it if enforcing right to do so CA s 441G	Subject to court order CA s 441H
Someone who owns property used/occupied/possessed by the company	May continue exercising any power/function if began to do so before administration began and have right to do so CA s 441F	

Steps during Administration

Company Administrator's Early Tasks

ASAP after being appointed

CA s 436DA: make “a declaration of relevant relationships” and “a declaration of indemnities”, provide copies to creditors, lodge copies with ASIC, etc

“before the end of the next business day”

CA s 450A:

- “lodge a notice of the appointment” and “cause a notice setting out the prescribed information... to be published”
- if appointed under CA s 436C, notify the company in writing
- notify in writing all with security interest(s) “in the whole, or substantially the whole, of the company's property” (but not one's appointer)

Administrator Early Tasks outline

- Declarations and notices: CA s 436DA, s 450A
- Investigate and report: CA s 438A
- Directors must provide:
 - Written report: CA s 438B(2)
 - Must be given within 5 business days of appointment
 - Books relating to the company: CA s 438B(1)(a)
 - Must attend on request: CA s 438B(3)
 - Failure to comply without reasonable excuse = offence (CA s 438B(4)-(6)).

Administrator's Investigation

CORPORATIONS ACT 2001 - SECT 438A

Administrator to investigate affairs and consider possible courses of action

As soon as practicable after the administration of a company begins, the administrator must:

- (a) investigate the company's business, property, affairs and financial circumstances; and
- (b) form an opinion about each of the following matters:
 - (i) whether it would be in the interests of the company's creditors for the company to execute a deed of company arrangement;
 - (ii) whether it would be in the creditors' interests for the administration to end;
 - (iii) whether it would be in the creditors' interests for the company to be wound up.

Administrator's Sources

Administrators are entitled to:

- **CA s 438B(3):** reasonably require director(s) to attend and give information regarding the company
- The company's books:
 - **CA s 438C:** Generally
 - **CA s 438B(1):** From directors
- **CA s 438B(2):** A report about the company's business, financial circumstances, property and affairs from the directors

CA s 438B(4)-(6): Offence if fail to comply with these provisions, unless have a "reasonable excuse" for CA s 438B sub-ss

- Max penalty: \$39,600 (CA Sch 3)

Court Supervision

CA s 447A: "court may make such orders as it **thinks appropriate** about how [Pt 5.3A]... is to operate in relation to a particular company"

- on application of the **company**, any **creditor**, company DOCA **administrator**, **ASIC**, or "any other **interest person**"
- e.g., may order **administration to end** if satisfied that it should end for any reason, including because:
 - "the company is **solvent**" or
 - "provisions... are being abused"

Provisions abused example: *Blacktown City Council v Macarthur Telecommunications Pty Ltd* (2003) 47 ACSR 391, [17]-[21]

- Trying to avoid investigation in winding up

During administration, "court may make such order as it thinks necessary to **protect** the... interests" of:

- Company's creditors, if ASIC applies (CA s 447B(1))
- The specific creditor who applies (CA s 447B(2))

First Meeting of Creditors

CA s 436E –

First meeting of creditors is "held within 8 business days after the administration begins"

- Contravened by the administrator “at least 5 business days before the meeting” by written notice “to as many of the company’s creditors as reasonably practicable” and publication of notice

So that creditors may:

- “determine... whether to appoint a **committee of inspection**; and... if so, who [will be its] ... members”
- “pass a resolution... removing the **administrator**... and... appointing someone else instead

Second Meeting of Creditors

CA s 439A: Second meeting of creditors is held “within 5 business days” before or after “the end of the convening period”

- Convened by the administrator, normally within 20 or 25 business days after administration begins (“contravening period”) subject to court extension

IPRC r 75-225: Courts receive:

- “Written notice” of meeting
- “a report... about the company’s business, property, affairs and financial circumstances”
- “a statement setting out” the administrator’s opinions on creditors’ options, the reasons for those opinions, details of any DOCCA proposal, “such other information known to the administrator as will enable the creditors to make an informed decision”, etc

Administration must:

- Lodge a notice of meeting with ASIC (IPRC r 75-40)
- Preside at the meeting; and (IPRC r 75-50(1))
- Ensure minutes are recorded and lodged with ASIC, etc; (IPRC r 75-145)
- And *may* adjourn it to a day that is ≤ 45 business days later (IPRC r 75-140)

Options at Second Meeting of Creditors

CA s 439C

- End administration
 - Company is not insolvent or near insolvency?
- Execute a DOCA
 - Before 2023/24, only around 1/3 of administrations led to a DOCA
- Wind up company
 - Around $\frac{3}{4}$ of administrations are stepping stone to deregistration within 5 years

Resolution at Second Meeting of Creditors

IPRC r 75-115: Resolution is passed by creditors on a poll if favourable vote from

- >50% in number who are “voting (whether in person, by proxy or by attorney)” and
- >50% in value who are “voting (whether in person, by proxy or by attorney)”;
- Or
- One of the above, plus a “casting vote in favour” by the presiding person (unless regarding their remuneration/removal)

Decided on a poll if:

- Poll is requested (IPRC r 75-110); or
- Notice of virtual meeting so specifies (IPRC r 75-75)

EXAM TIP (Voting): compute both limbs on the voters present—>50% in number and >50% in value; if only one limb met, consider casting vote (IPRC r 75-115(3)).

This aligns your example with the exact test

Voting Example	
Suppose Company A has the following creditors: • Creditor 1, who is owed \$50 • Creditor 2, who is owed \$3 • Creditor 3, who is owed \$7 • Creditor 4, who is owed \$5 If at the second meeting of creditors: • Creditor 1 does not attend (neither in person nor otherwise) • Creditor 2 attends in person • Creditor 3 attends by attorney • Creditor 4 attends by proxy	If Creditor 2 and Creditor 4 vote in favour of a proposed DOCA, and Creditor 3 votes against it, the creditors resolve in favour of it because: • it is >50% in number of those voting (2 out of 3 creditors in total, so 66.67%); and • they are owed >50% among those voting (\$3 + \$5 = \$8 out of \$3 + \$7 + \$5 = \$15 in total, so 53.33%)

End of Administration

CA s 435C(1)(b): Administrator ends when the first of these occurs:

- **CA s 435C(2):** Creditors resolve at their second meeting for:
 - the company to be wound up;
 - a DOCA to be executed and this occurs
 - administration to end
- **CA s 435C(3):** other events

If administration ends without winding up or DOCA, control reverts to directors.

Other events ending administration

CA s 435C(3): An administration also ends immediately if one of these occurs:

- *At any time:*
 - A court orders the administration to end – e.g., under CA s 447A
 - A court orders winding up or appoints a provisional liquidator
- *Before second meeting:*
 - The second meeting of creditors is not convened in time and no extension application
 - A court application to extend the time for convening the second meeting is unsuccessful
 - The second meeting is not convened in time, despite a court extension
- *After second meeting:*
 - the second meeting ends without a resolution in favour of any of the 3 options
 - creditors resolve in favour of a DOCA proposal, but a DOCA is not executed in time
- etc

When Administration Ends

Company transitions to a **court-ordered winding up** or **prov liquidation** if:

- court orders winding up; or
- court orders provisional liquidation

CA s 446A: Company transitions to a creditors' voluntary winding up if:

- Creditors resolve in favour of winding up; or

- Creditors resolve in favour of DOCA execution, but one is not executed in time

CA s 44B(6): Company becomes subject to a DOCA if:

- Creditors resolve in favour of DOCA execution and it is executed by the company and the DOCA administrator in time

Control of the company reverts to its board of directors if:

- Administration ends for any other reason and the company was not under external administration right before administration
 - See, e.g., [*Blacktown City Council v Macarthur Telecommunications Pty Ltd* \(2003\) 47 ACSR 391](#), [23] (Barrett J)

Links to Further Content –

- If the administration fails → liquidation automatically follows under s 446A(5). If a DOCA is proposed and accepted → proceed to Part 5.3A (Topic 3).