THE
RESTRUCTURING REVIEW

Seventh Edition
Editor
Christopher Mallon

Law Business Research
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I am very pleased to present this seventh edition of The Restructuring Review. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions prevailing in the global restructuring market in 2014 and 2015 and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years, and that are expected to be significant in the future.

In many jurisdictions the general economic trends are now more positive than they have been for many years. Against this background, the trend of diminished large-scale restructuring activity has continued in many markets. This picture may suggest a global economy in robust health after the long and difficult years of recession but it would be na"ive to think that stability has returned for the long term as several warning signs remain.

First, the dramatic growth of high-yield issuances of past years may lead to unknown consequences further down the road. In the United States, 2012 and 2013 were each record years for high-yield issuance, and across the Atlantic this market is finally achieving a similar stage of development. At the time of writing, total European high-yield issuances for 2014 had already surpassed the annual totals for every year before 2013, and Credit Suisse was forecasting a record level of issuances for the year. As has happened in the past, it is inevitable that such large increases in economic activity will include inappropriate or unfortunate deals, the effects of which will need to be unpicked in future years with the help of restructuring professionals. The same will no doubt apply to the surge in M&A activity that has recently been observed in many developed economies.

A further factor to note is the continued employment of unorthodox monetary policy by many central banks. There remains considerable uncertainty as to the broader economic effects when quantitative easing is unwound and when interest rates return nearer to the long-term average; many commentators expect that when the monetary tide retreats many businesses that until now have managed to conceal their weaknesses may be left dangerously exposed.

With the above in mind, and taking into account also the stresses that continue to lie beneath the surface in the eurozone and some worrying signs of instability in the
emerging economies, only the very brave would forecast a prolonged period of calm for the global economy. As such, this work continues to be relevant and important, in particular as a result of the international nature of many corporate restructurings.

I would like to extend my gratitude to the contributors from some of the world’s leading law firms who have given such valuable support and cooperation in the preparation of this work, and to our publishers, without whom this Review would not have been possible.

Christopher Mallon
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
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Chapter 1

AUSTRALIA

Dominic Emmett, James Lewis and Nicholas Edwards

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

It is well documented that Australia emerged from the turbulent times that followed the collapse of Lehman Brothers in comparatively good shape. The market has in recent times, however, become increasingly susceptible to financial stresses caused by factors at both domestic and international levels. At the international level, such factors include decreased demand and consumption emanating from China and the changes to capital requirements resulting from the third instalment of the Basel Accords. On the domestic front, businesses and individuals have focused on reducing their debt burden and, particularly at a consumer level, on increasing savings. This mentality has affected attitudes in the market, and retail and commercial property continue to underperform despite successive interest rate cuts by the Reserve Bank of Australia.

Within this landscape the secondary debt trading market has steadily grown, and this has seen a growth in consensual restructurings, particularly as borrowers find it difficult to refinance. The relative stability of the Australian banking sector, the robust prudential regulations imposed on Australian banks and a willingness of par lenders to exit their positions – often at considerable discounts – has promoted increased activity in the secondary debt trading market since 2009, which reached peak levels in 2012.

This increase was driven by a number of factors including:

- the large number of underperforming loan portfolios that exist in the market;
- large numbers of overleveraged project finance deals;
- the stressed export market conditions for Australian producers and manufacturers brought about by a strong Australian dollar;

1 Dominic Emmett and James Lewis are partners and Nicholas Edwards is a lawyer at Gilbert + Tobin. The authors would also like to thank Valentina Arena for her contribution.
Australia

d an ongoing supply of 2007–2008 leveraged buyout debt coming through the system for refinancing;
e the expiry of temporary measures put in place by distressed businesses post-global financial crisis;
f a shrinking pool of participants willing to refinance; and
g the common focus of banks on the need to recycle unproductive capital quickly in light of capital allocation and opportunity costs.

This increased willingness to trade has seen a number of international players enter the market, commonly in the form of hedge funds and private equity funds. These funds can have very different goals, time frames and strategies to the former dominant local financial institutions. In combination, these circumstances have also given rise to an increase in the pursuit of ‘debt for equity’ restructurings. Given that the ultimate goal of this strategy is often ownership of the business, hedge fund participants are more conscious of enterprise value destruction and there has been a reluctance to proceed to formal insolvency in these circumstances (particularly at the higher end of the market). As a result, schemes of arrangement are becoming an increasingly common mechanism through which to effect these strategies, although the threat of a formal insolvency process, such as receivership or voluntary administration, is often used as a bargaining tool in restructuring negotiations.

The increase in debt trading over the past two years has led to the debt in restructured entities being held by hedge funds and other institutions, and not necessarily traditional lenders. The restructurings of Centro, Alinta, Redcape, I-Med, Colorado and, more recently, Billabong, Mirabela Nickel Limited and the Nine Entertainment Group have all had a large number of hedge fund participants. This has seen a consequential change in dynamics within lender groups, as hedge funds are more willing than traditional banks to take equity positions. This has begun to evolve in recent times, however, and certain banks are now more willing to consider quasi-equity positions in the Australian market. Traditional lenders are also increasingly requiring the issue of warrants in return for their agreement to restructure debt facilities.

Foreign banks with exposures in Australia (predominantly from the United States, United Kingdom and continental Europe) continue to take active steps to reduce their current exposure in Australia. This has been due in large part to the pressure on foreign banks to deleverage in foreign countries due to problems at home and is also a reflection of the opportunities in the current Australian market to relieve themselves of ‘bad’ debt. This decline has seen a parallel (albeit not equal) rise in Asian bank exposure in Australia. This has been by way of both an increase in exposure for pre-existing market participants (particularly Japanese banks) and also new participants entering the market, particularly from China.

2013 and early 2014 saw a number of loan portfolio sales whereby both Australian and foreign banks sought to exit their potential exposures completely. These sales processes were very competitive, and involved both hedge funds and, in the case of the Lloyds book, an Australian institutional bank.

In the first quarter of 2014, Australian GDP expanded on a seasonally adjusted basis by 1.1 per cent over the previous three months, the highest growth in the past seven quarters. Growth was driven by net exports, consumption expenditure and private
investment, while changes in inventories and public investment declined. Despite this economic indicators continue to paint a patchy outlook for Australia’s economy in the near term. There are areas of increased vulnerability in the marketplace, particularly as the resources boom slows. Corporate collapses are occurring throughout Australia due in large part to slackening demand, cash-flow concerns, and an inability to refinance at the same leverage levels. Leverage levels generally have dropped from, at the aggressive end, five to six times EBITDA\(^2\) to two to three times EBITDA.

Sectors that have been hit particularly hard in recent times include property, retail (which is a reflection of broader factors playing out on a global scale, such as an increased focus on savings and shoppers turning to online purchasing) and the construction sector, which has been a victim of cash-flow problems, particularly as government stimulus funds are exhausted and industrial action escalates. There is also increased evidence of consolidation in the mining sector and this is expected to continue as commodity prices remain volatile and companies continue to take cost-cutting steps to raise efficiency. Australian government statistics for the first half of 2014 show a continued contraction of the manufacturing, services and construction industries. Increased restructuring activity is expected in each of these categories and, in particular, in mid-market mining projects and mining services companies in Western Australia and Queensland.

The slackening of growth in the mining sector will see a significant shift in the Australian economy with some economists arguing that it is merely a correction in the false economy created by the resources boom and there will be an inevitable increase in insolvency appointments in this sector. Western Australia is currently driving change in the national outlook as it slows. Having been the driving force over the past decade with average annual growth rates of almost 8 per cent, there has been in recent times a decline in such growth rate and the beginning of 2014 saw state final demand continue to fall. 2011 and 2012 proved to be the worst years on record for Australian businesses entering external administration.\(^3\) In the first quarter of 2014, however 2,014 companies entered external administration, which represents the lowest number of insolvencies for both a three-month period and the start of a year since the first quarter of 2008. Voluntary administration, where such an administrator is appointed by the board of directors (rather than creditor appointed), is the most popular of these regimes as directors struggle with testing financial conditions and look to preserve the underlying asset value afforded by the accompanying moratorium, while also protecting themselves from personal liability.

A significant proportion of external administration appointments have resulted from borrowers breaching financial covenants, failing to meet an amortisation payment or an inability to refinance debt facilities at the end of their term. In these circumstances, where a mutually acceptable deal has not been able to be reached between equity, management and the lenders, directors will invariably opt to appoint a voluntary administrator or invite the secured lenders to appoint a receiver over the company’s assets. It would, however, be rare for the board of a company with secured lenders to appoint a voluntary administrator without first inviting the secured lenders to appoint a

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\(^2\) Earnings before interest, taxes, depreciation and amortisation.

\(^3\) This includes receivership, voluntary administration and liquidation.
receiver, or to make a dual appointment of both voluntary administrator and receiver in a coordinated fashion.

Curiously, during this period secured lenders have granted far more leniency to borrowers, and have been more willing to work through restructurings to ensure businesses remain viable as a going concern. Put another way, formal appointments are often seen as the least attractive option, and therefore the rate of appointments could have been higher if lenders had been quicker to commence external administration, as they were in the recession of the early 1990s.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

i Formal procedures

The formal procedures available under Australian law are:

a receivership (both private and court-appointed);

b voluntary administration;

c a deed of company arrangement (DOCA);

d provisional liquidation;

e liquidation; and

f a court-sanctioned scheme of arrangement between creditors and the company.

For receivership, voluntary administration, DOCA and liquidation, the individual appointed must be an independent registered liquidator, except in the case of a member’s voluntary liquidation.

Receivership

The main role of a receiver is to take control of the relevant assets, and realise those assets for the benefit of the secured creditors. One or more individuals may be appointed as a receiver or a receiver and manager of the relevant assets. Despite some historical differences, in practice it is difficult to distinguish between the two roles and most security interests will allow for the appointment of either. Receivers are not under an active obligation to unsecured creditors on appointment, although they do have a range of duties under statute and common law. Despite being appointed by the secured creditors, a receiver is not obliged to act on the instructions of the secured creditors. A receiver must, however, act in their best interests and this will invariably lead a receiver to seek the views of secured creditors on issues that are material to the receivership.

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

For a privately appointed receiver the security document itself will entitle a secured party to appoint a receiver, and will also outline the powers available (supplemented by the statutory powers set out in Section 420 of the Corporations Act 2001 (Cth) (the Act)). Generally, a receiver has wide-ranging powers including the ability to operate, sell or borrow against the secured assets. The appointment is normally effected contractually through a deed of appointment and indemnity, and the receiver will be the agent of the debtor company, not the appointing secured party.

On appointment, a receiver will immediately take possession of the assets subject to the security. Once in control of the assets the receiver may elect to run the business if he or she is appointed over all or substantially all of the assets of a company. Alternatively, and depending on financial circumstances, a receiver may engage in a sale process immediately. While engaging in a sale process, a receiver is under a statutory obligation to obtain market value, or in the absence of a market, the best price obtainable in the circumstances; this obligation is enshrined in Section 420A of the Act. It is this duty that has posed the most significant stumbling block to the adoption of pre-packaged restructuring processes through external administration that have been seen in, for example, the UK market. This is because of the inherent concern that a pre-packaged restructure that involves a sale of any asset without testing against the market could be seen as a breach of the duty under Section 420A.

Once a receiver has realised the secured assets and distributed any net proceeds to the secured creditors (returning any surplus to the company or later ranking security holders) he or she will retire in the ordinary course.

**Voluntary administration**

The concept of voluntary administration was introduced in 1993. Voluntary administration, unlike receivership, is entirely a creature of statute and its purpose and practice is outlined in Part 5.3A of the Act. Voluntary administration has been compared with the Chapter 11 process in the United States, but unlike the Chapter 11 process voluntary administration is not a debtor-friendly process. In a voluntary administration the creditors control the final outcome to the exclusion of management and members. The creditors ultimately decide on the outcome of the company, and it rarely involves returning management responsibilities to the former directors.

The purpose of Part 5.3A is to either:

- maximise the chances of the company, or as much as possible of its business, to continue in existence; or
- if (a) is not possible, achieve a better return for the company’s creditors and members than would result from an immediate winding up of the company.\(^5\)

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4 Often referred to as a ‘pre-pack’, this is where a restructure is developed by the secured lenders prior to the appointment of a receiver and is implemented immediately or very shortly after the appointment is made.

5 Section 435A of the Act.
There are three possible ways an administrator may be appointed under the Act:

a by resolution of the board of directors that, in their opinion, the company is, or is likely to become, insolvent;\(^6\)

b a liquidator or provisional liquidator of a company may, in writing, appoint an administrator of the company if he or she is of the opinion the company is, or is likely to become, insolvent;\(^7\) and

c a secured creditor who is entitled to enforce security over the whole or substantially whole of a company’s property may, by writing, appoint an administrator if the security interest is over the property and is enforceable.\(^8\)

An administrator has wide powers, and will manage the company to the exclusion of the existing board of directors. Once an administrator is appointed, a statutory moratorium is activated, which restricts the exercise of rights by third parties under leases and security interests\(^9\) and in respect of litigation claims, which is designed to give the administrator the opportunity to investigate the affairs of the company, and either implement change or be in a position to realise value, with protection from certain claims against the company.

There are two meetings over the course of an administration critical to the outcome of the administration. Once appointed, an administrator must convene the first meeting of creditors within eight business days (at such meeting the identity of the voluntary administrator is confirmed, the remuneration of the administrator is approved and a committee of creditors may be established). The second creditors’ meeting is normally convened 20 business days after the commencement of the administration (this may be extended by application to the court). At the second meeting the administrator provides a report on the affairs of the company to the creditors and outlines the administrator’s views as to the best option available to maximise returns. There are three possible outcomes that can be put to the meeting:

a enter into a DOCA with creditors (discussed further below);

b wind up the company; or

c terminate the administration.\(^10\)

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

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\(^6\) Section 436A of the Act.

\(^7\) Section 436B of the Act.

\(^8\) Section 436C of the Act.

\(^9\) There is, however, an exception to the moratorium on the exercise of rights under security interests in the case of a secured creditor that has security over all or predominantly the whole of the assets of the company.

\(^10\) Section 439C of the Act.
interest unless the termination is due to the implementation of a DOCA approved by that secured creditor.

**Deed of company arrangement**

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

The terms of a DOCA may provide for, *inter alia*, a moratorium of debt repayments, a reduction in outstanding debt and the forgiveness of all, or a portion of, the outstanding debt. It may also involve the issuance of shares, and can be used as a way to achieve a debt-for-equity swap.

Entering into a DOCA requires the approval of a bare majority of creditors both by value and number voting at the second creditors’ meeting. A DOCA will bind the company, its shareholders, directors and unsecured creditors. Secured creditors do not need to vote at the second creditors’ meetings and only those who voted in favour of the DOCA at the second creditors’ meeting are bound by its terms. Unlike a scheme of arrangement, court approval is not required for a DOCA to be implemented provided it is approved by the requisite majority of creditors.

Upon execution of a DOCA, the voluntary administration terminates. The outcome of a DOCA is generally dictated by the terms of the DOCA itself. Typically, however, once a DOCA has achieved its goal it will terminate. If a DOCA does not achieve its goals or is challenged by creditors it may be terminated by the court.

**Provisional liquidation**

A provisional liquidator may be appointed by the court in a number of circumstances. The most commonly used grounds include:

- **a** insolvency;
- **b** where an irreconcilable dispute at a board or shareholder level has arisen that affects the management of the company;
- **c** where the shareholders of the company have, by special resolution, resolved that it be wound up; or
- **d** if the court is of the opinion that it is just and equitable to do so.

A creditor, a shareholder or the company itself has standing to apply for the appointment of a provisional liquidator, although in most cases a creditor will be the applicant. A provisional liquidator will normally only be appointed by the court when there is a risk to the assets of a company prior to a company formally entering into liquidation. As such, a provisional liquidator is normally only given very limited powers (i.e., the power to take possession of the assets) and the main role of the provisional liquidator is to preserve the *status quo*.

A court determines the outcome of a provisional liquidation. It may order either that the company move to a winding up, with the appointment of a liquidator, or that the appointment of the provisional liquidator is terminated.
Liquidation

Liquidation is the process whereby the affairs of the company are wound up and its business and assets are realised for value. A company may be wound up voluntarily by its members if solvent or, alternatively, if it is insolvent, by its creditors or compulsorily by order of the court.

Voluntary liquidation (members and creditors)

The members of a solvent company may resolve that a company be wound up if the board of directors is able to give a 12-month forecast of solvency (i.e., an ability to meet all its debts within the following 12 months). If not, or if the company is later found to be insolvent, the creditors take control of the process. Creditors may resolve at a meeting of creditors to wind up the company and appoint a liquidator (this may take place at the second meeting of creditors during an administration). If the requisite approvals are obtained in either a members’ voluntary winding up or a creditors’ voluntary winding up, a liquidator is appointed.

Compulsory liquidation

The most common ground for a winding-up application made to the court is insolvency, usually indicated by the company’s failure to comply with a statutory demand for payment of a debt or a judgment debt. Following a successful application by a creditor a court will order the appointment of a liquidator.

In both a voluntary and compulsory winding up, the liquidator will have wide-ranging powers, including the ability to challenge voidable transactions and take control of assets. Generally, a liquidator will not run the business as a going concern, unless it will ultimately result in a greater return to stakeholders. During the course of the winding up, the liquidator will realise the assets of the company for the benefit of its creditors and, to the extent of any surplus, its members. At the end of a winding up the company will be deregistered and cease to exist as a corporate identity.

Scheme of arrangement

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

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

A scheme of arrangement must be approved by at least 50 per cent in number and 75 per cent in value of creditors in each class of creditors. It must also be approved by the court in order to become effective.

The outcome of a scheme of arrangement is dependent on the terms of the arrangement or compromise agreed with the creditors, but most commonly, a company
is returned to its normal state upon implementation as a going concern but with the relevant compromises having taken effect.

The scheme of arrangement process does, however, have a number of limiting factors associated with it, including cost, complexity of arrangements (i.e., class issues), uncertainty of implementation, timing issues (i.e., because it must be approved by the court it is subject to the court timetable and cannot be expedited) and the overriding issue of court approval (a court may exercise its discretion to not approve a scheme of arrangement, despite a successful vote, if it is of the view that the scheme of arrangement is not equitable). These factors explain why schemes of arrangement tend only to be undertaken in large corporate restructures and in scenarios where timing is not fatal to a restructure.

ii Rights of enforcement
Secured creditors may enforce their rights in every form of external administration. During a voluntary administration, a secured creditor with security over all or substantially the whole of the company’s property may enforce its security, provided it does so within 13 business days of receiving notice of appointment of the voluntary administration, or with leave of the court or consent of the administrator. In addition, if a secured creditor takes steps to enforce its security before the voluntary administration commences it may continue to enforce its security.

Where a company pursues a DOCA, a secured creditor who did not vote in favour of such a proposal will have the ability to enforce its security interests once the DOCA becomes effective. If a voluntary administration otherwise terminates a secured creditor may also commence steps to enforce its security interest upon termination.

Each formal procedure, other than receivership, has moratoria in place to prevent unsecured creditors from enforcing their rights during the course of the external administration.

iii Directors’ duties in distressed situations
Recent case law in Australia, particularly the Westpac Banking Corporation v. Bell Group Ltd (in liq) case (Bell), has reaffirmed the position that a director must be increasingly mindful of the interests of creditors as a company approaches insolvency. A director’s duty to creditors arises by operation of the well-established fiduciary duty owed by a director to the company more generally. When a company is solvent the interests of the shareholders are paramount, and conversely, as recent case law has emphasised, when a company is near insolvency or of doubtful solvency, the interests of the creditors become increasingly relevant. It is important to emphasise that the duty to take into account creditors’ interests is owed to the company, not to the creditors per se.

The extent of this duty continues to be an evolving area of the law. It is, however, now well established under Australian law that directors must at the very least have

12 Spies v. the Queen [2000] HCA 43.
regard to the interests of creditors when a company is in financial distress or insolvent. As noted by Lee AJA in *Bell*:

> At the point of insolvency, or the pending manifestation of insolvency, the duty to act in the best interests of each company was of central importance for the companies to comply with statutory obligations and the obligation of the companies not [to] prejudice the interests of creditors.

Further, it has been suggested that when the solvency of a company is doubtful or marginal it would be a misfeasance to enter into a transaction that the directors ought to know is likely to lessen the company’s value if to do so will cause a loss to creditors. Directors should not, for instance, allow the company to enter into commitments that it clearly will not be in a position to meet or that may prejudice the interests of creditors generally.

It is also conceivable that directors could be held liable for loss suffered as a result of a transaction during a period of insolvency or near insolvency that is clearly value dilutive. Transactions that are challenged, and that could put directors at risk, normally involve shareholders, directors and related parties receiving a benefit to the detriment of the company. It has, however, been noted that there are limitations on this duty to creditors, and specifically that it is ‘a duty of imperfect obligation owed to creditors, one which the creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator’.13

Put another way, a breach of such a duty does not give rise to a direct right of action that may be brought by the creditors against the directors; rather, it gives rise to a right of action that must be undertaken either by the company itself or a liquidator, if and once appointed.

**Insolvent trading**

Directors may be held liable for new debts incurred by a company trading while cash-flow insolvent. This potential liability does not extend to debts incurred prior to the date a company became cash-flow insolvent, or recurring payments that become due after that date under the terms of pre-existing arrangements such as rent or interest (i.e., when the liability to pay such amounts already existed at the time of insolvency).

In terms of a director’s personal liability a court may make an order requiring the director to compensate the company for loss arising out of the insolvent trading, preventing a director from managing a corporation for a period of time and in rare circumstances where the failure to prevent insolvent trading is ruled as a result of dishonesty a fine of A$200,000 may be levelled against the offending director.

In certain circumstances the insolvent trading provisions will also extend to holding companies.14

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13 Gummow J in *Re New World Alliance Pty Ltd (Receiver and Manager Appoint); Sycotex Pty Ltd v. Baseler (No 2) [1994] 51 FCR 425* (and cited with approval in Bell).
14 Section 588V of the Act.
The appointment of a voluntary administrator or a liquidator by the directors protects a director from any claim that he or she allowed the company to trade while insolvent in respect of any debts incurred after the date of such appointment.

iv Clawback
Under Australian law, transactions will only be vulnerable to challenge when a company does in fact enter into liquidation. A liquidator only has the ability to bring an application to the court to declare certain transactions void. In the report to creditors at the second meeting, a voluntary administrator may identify potentially voidable transactions but he or she is not empowered to pursue a claim in respect of such transaction. Any such claim must be brought by a liquidator subsequently appointed.

To be subject to challenge, such transactions will need to have been entered while the company was proven to be cash-flow insolvent and include:

- director-related transactions;
- unfair preferences;
- uncommercial transactions;
- transactions entered into to defeat or delay creditors; or
- unfair loans.

Each type of voidable transaction has a different criterion and a different time threshold (transactions with related parties are afforded a longer hardening period).

Upon the finding of a voidable transaction a court may make a number of orders, including directions that the offending person pay an amount equal to some or all of the impugned transaction; direct a person to transfer the property back to the company; or direct an individual to pay an amount equal to the benefit received.

III RECENT LEGAL DEVELOPMENTS

In 2012, the Personal Properties Securities Act 2009 (Cth) (PPSA) came into force in Australia, modelled largely on equivalent legislation in New Zealand and Canada. This legislation consolidated all of the existing registers on which security interests were previously registered and amended many of the concepts and terms associated with taking security over assets.

i Security interest
The PPSA introduced a uniform concept of a ‘security interest’ to cover all existing forms of security interests, including mortgages, charges, pledges and liens. It applies primarily to security interests under which an interest in personal property is granted pursuant to a consensual transaction that, in substance, secures payment or performance of an obligation. It also applies to certain deemed security interests such as certain types of lease arrangements for certain terms, retention of title arrangements and transfers of debts, whether or not the relevant arrangement secures payment or performance of an obligation. ‘Personal property’ is broadly defined and essentially includes all property other than land, fixtures and buildings attached to land, water rights and certain statutory licences.
The legislation has introduced a new lexicon relating to security in Australia. For instance, the traditional concept of a fixed and floating charge has now been replaced by ‘general security agreement’ and the PPSA now determines whether an asset is in effect subject to a floating charge on the basis that only circulating assets, as defined by the PPSA, will be treated as being subject to a floating charge for the purposes of other legislation including the provisions of the Act that provide priority of certain claims over floating charge assets. Generally, attachment and perfection of a security interest occurs when the grantor and the secured party execute a security agreement, although the parties can defer attachment, and the security interest is registered on the PPSA register. Security interests over certain assets can, however, be perfected other than by way of registration, for example, by the security holder controlling the relevant asset in the manner prescribed by the PPSA.

The concept of security interest is broad enough to capture pre-existing forms of security and the documentation creating security has not changed significantly.

One of the most significant changes implemented by the PPSA is to require the registration of retention of title arrangements in order to protect a supplier’s title to the relevant supplied goods.

If a security interest is not perfected in accordance with the PPSA the security interest will, on liquidation of the grantor, vest in the grantor. This has created a paradigm shift for retention of title arrangements since failure to perfect the retention of title arrangement (by registration) will vest title in the relevant goods in the recipient of the goods, despite the agreement between supplier and recipient that the supplier retains title to those goods until they are paid for.

ii Non-PPSA property

The PPSA does not cover security interests in land or fixtures and buildings attached to land and a mortgage over real property must be registered under the Torrens Title system that operates under Australian law by registration on the relevant state or territory land title register.

There are also certain assets such as statutory licences (such as mining licences), which by virtue of statute are expressed to be outside the operation of the PPSA and any security interest over any such asset is governed by common law.

There have been limited cases before the courts dealing with the PPSA, and so at this stage the New Zealand and Canadian authorities provide instructive (yet non-binding) authority in respect of the interpretation of the PPSA.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

The Australian debt market continues to experience increased activity, particularly from overseas investors in the secondary debt trading market. Many international hedge funds view Australia as a relatively safe option for investment, and the traditional banks now see an opportunity to exit what they now see as highly leveraged positions. There has been a general increase in the use of formal and informal workouts to achieve a debt-for-equity position through the purchase of debt.
Put another way, the incoming debt purchaser is able to position itself where it can exert control over the company or external administration process and ultimately the asset. The successful Billabong restructuring\(^{15}\) was the major restructuring transaction in 2013 and an example of this. The successful restructuring did not involve formal insolvency *per se*, but rather saw the strategic purchase of outstanding debt used as a negotiation position with the company. Ultimately the transaction saw Billabong emerge with a deleveraged balance sheet and with the new lenders as substantial equity holders in the business. Billabong continues to be listed on the Australian Securities Exchange (ASX).

Another major restructure transaction over the course of 2014 was the recapitalisation of Mirabela Nickel Limited. The Mirabela group entered into financial difficulties at the end of 2013 due to the declining global price of nickel and the loss of a major off take supplier. The unsecured note holders of Mirabela (with an exposure of approximately US$450 million) negotiated a standstill arrangement with the company and then commenced negotiations for a potential recapitalisation. The final plan consisted of a coordinated voluntary administration in Australia and a related but not interdependent Brazilian extrajudicial process. The successful restructuring involved a debt-equity swap, whereby majority of the listed shares would be transferred to the creditors pursuant to leave of the court. This transaction represented the first time that such a transfer was contemplated in a listed context. Mirabela’s trading suspension was lifted shortly after the recapitalisation was finalised.

Lower growth forecasts, a decline in Australian competitiveness as a result of worsening labour market flexibility and dwindling consumer confidence indicates that the Australian economy is likely to face a challenging 12 to 18-month period. The resources sector continues to show signs of decline, and this will see increased insolvency activity in this sector as both mining and mining services companies face the prospect of lower liquidity, lower terms of trade and an ongoing inability to refinance.

**V INTERNATIONAL**

Australian courts cooperate with foreign courts and insolvency practitioners, and will recognise the jurisdiction of the relevant court in which the ‘centre of main interest’ is located. This approach follows the UNCITRAL Model Law on insolvency, which were codified into Australian law through the Cross-Border Insolvency Act 2008 (Cth).

There is also scope under different legislation such as the Act for Australian courts to recognise foreign judgments in Australia. Specifically under Section 581 of the Act, Australian courts have a duty to render assistance when required by a foreign insolvency court. Further, the Act has extraterritorial application; for example, an Australian court has jurisdiction to wind up a foreign company.

Receivers do not have the benefit of taking action in foreign jurisdictions that other insolvency administrators have under the Cross-Border Insolvency Act 2008.\(^{16}\)

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15 Led by US hedge funds Centerbridge Partners and Oaktree Capital.
16 Section 8.
This is because receiverships relate only to a debt owed to the appointer, and as such cannot be said to be collective proceedings in terms of the application of the Model Law.

VI FUTURE DEVELOPMENTS

Basel III capital requirements and the desire to exit distressed scenarios with some value will continue to incentivise Australian institutional banks and traditional foreign banks to trade debt. The Australian market will continue to be attractive for hedge funds looking to pursue control transactions after acquiring debt positions.

It continues to be anticipated that any large-scale restructures will continue to occur outside formal insolvency procedures, although it is likely there will be a decline in their frequency. The pursuit of debt-for-equity strategies will continue at the instigation of hedge funds willing – and often seeking – to take an equity interest in a company (including management roles). This debt-for-equity play is likely to extend to bilateral arrangements over time should opportunities present themselves.

The number of formal insolvency appointments at the small to mid-cap level of business will increase as companies continue to struggle with liquidity problems, currency fluctuations and waning local and international demand.

In terms of future legislative development, there is a continued push within the insolvency and restructuring fraternity to amend the Act, including:

a possible tweaking of the business judgement rule for directors in order to create more opportunity for a director-driven restructure or work-out without the fear of draconian insolvent trading provisions;

b new ways to address phoenix activity, which sees companies ‘reborn’ without former liabilities and is often associated with the construction industry;

c greater transparency around insolvent administrations (of all forms); and

d a change to the director penalty regime, particularly with respect to making directors liable to tax-related penalties.
Appendix 1

ABOUT THE AUTHORS

DOMINIC EMMETT

*Gilbert + Tobin*

Dominic Emmett heads the restructuring and insolvency group at Gilbert + Tobin and brings nearly 30 years of significant local and international experience.

Mr Emmett specialises in non-contentious restructuring and insolvency work for banks and financial institutions, as well as special situation groups and distressed debt funds. His expertise includes preparing and negotiating standstill and forbearance arrangements; debt restructuring and schemes of arrangement; structured administration and receivership sales; and advice to directors, receivers, administrators and liquidators.

In 2011 and 2012, he was named as a leading restructuring and insolvency lawyer by *Chambers Asia Pacific* legal directory, was named in the *Best Lawyers* list for insolvency and reorganisation and Sydney Distressed Investing and Debt Trading. Mr Emmett was nominated at the 2011 ALB Law Awards for Dealmaker of the Year, and in 2008, 2009, 2011 and 2013 was part of the teams that won the ALB Law Award for Restructuring and Insolvency Deal of the Year and in 2013 the ALB Law Award for Australian Deal of the Year. In 2013 he was named a Lawyer of the Year for Sydney Reconstruction and Insolvency.

JAMES LEWIS

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James Lewis is a partner in Gilbert + Tobin’s banking and finance group with over 18 years’ experience practising in Australia, Singapore and the United Kingdom.

Mr Lewis specialises in leveraged and corporate finance and he has particular expertise in debt restructuring including negotiation of standstill and forbearance arrangements and advising generally on corporate and debt restructures. He frequently advises management and directors of companies and managed investment schemes in financial stress on their duties and obligations.
He has been named by *Chambers Asia Pacific* as a leading lawyer in restructuring and insolvency in 2011, 2012 and 2013. He also recently led the Gilbert + Tobin team that advised the arrangers of the Fortescue Metals Group Term Loan B refinancing, which was awarded Debt Market Deal of the Year and was nominated for Deal of the Year at the 2013 ALB Law Awards.

**NICHOLAS EDWARDS**

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Nicholas Edwards is a lawyer in Gilbert + Tobin’s restructuring and insolvency group. He specialises in non-contentious restructuring and insolvency work for banks, insolvency practitioners, distressed debt funds, debtors and company directors. His experience includes advising directors on their duties in distressed scenarios, advising on the sale and purchase of distressed assets and debts, debt and security restructuring and enforcement, advising on debt funding and intercreditor issues and generally advising insolvency practitioners.

Recent matters include advising Centerbridge Partners and Oaktree Capital on the Billabong transaction; certain noteholders and the deed administrators on the Mirabela Nickel Limited restructure; the directors of the Nine Entertainment Group in relation to its debt restructure and scheme of arrangement; the lenders and receivers of the Top Ryde Shopping Centre with respect to the sale of outstanding debt; and the administrators of the Griffin Energy Group, based in Perth.

Mr Edwards is a member of the Australian Restructuring Insolvency and Turnaround Association.

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