REVIEW

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Debt Restructuring Report - 3rd Edition

MinterEllison.

Contents

> This upward trend was caused by so-called 'zombie' companies which managed to delay collapse, but ultimately couldn't withstand the pressure of sustained high interest rates, limited access to capital, and mounting trading headwinds."
>
> *Michael Hughes*

Introduction ›

Over the past year, there has been a significant rise in the number of businesses entering insolvency and appointing administrators.

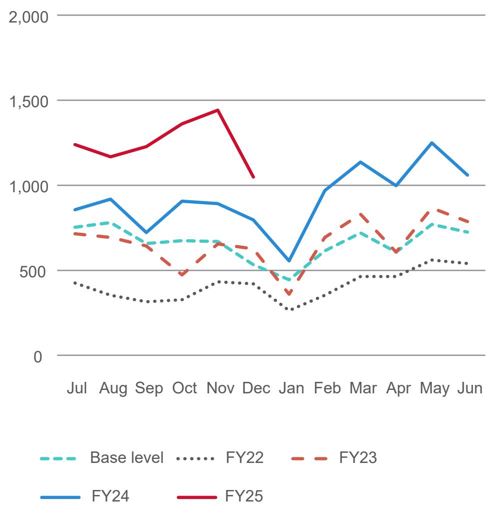
In this paper, we take a closer look at this trend, which industries are most impacted and why. In addition, we explore three strategies relevant to debt restructuring:

- Safe harbour: there is an increasing reliance by directors on this to enable insolvent companies to continue to trade;
- Loan to own: this strategy is being implemented in a number of different and interesting ways;
- Creditors' schemes of arrangement: creditors' schemes could be used more by companies in Australia, like in the UK, to give them vital breathing space to implement a restructure at a later date. For example, to amend existing finance arrangements by:
  - extending maturity dates;
  - reducing an existing consent threshold to enable a future restructure; or
  - resetting loan covenants.

Insolvencies are on the rise

According to the Australian Securities and Investment Commission's (ASIC) Insolvency Statistics, compared to prior periods more than 13,000 companies entered external administration for the first time, as seen in Figure 1.

Figure 1: More companies are entering administration for the first time



Source: ASIC Insolvency Statistics (released 28 January 2025)
FY starts at July; FY25 started at July 2024
Base level is the average of financial years FY17, FY18 and FY19 (pre-COVID)

If the current monthly run-rate of 1,200 companies continues over the next six months, FY25 is expected to have around 15,000 companies enter external administration in total – 36% higher than the 11,000 insolvencies seen in 2024.

Looking at this ASIC data – combined with the uptick in non-performing assets of banks in 2024 – we believe this upward trend will continue.

The various operating headwinds, weak household consumption growth, interest rates remaining elevated and geopolitical tensions will all impact corporate earnings.

Industries most at risk are the construction, food services, and some sectors of the mining industry, which are seeing a decline in profitability and cash flows due to macro factors and industry-specific headwinds (such as labour shortages and lower commodity prices).

The next chapter in debt restructuring

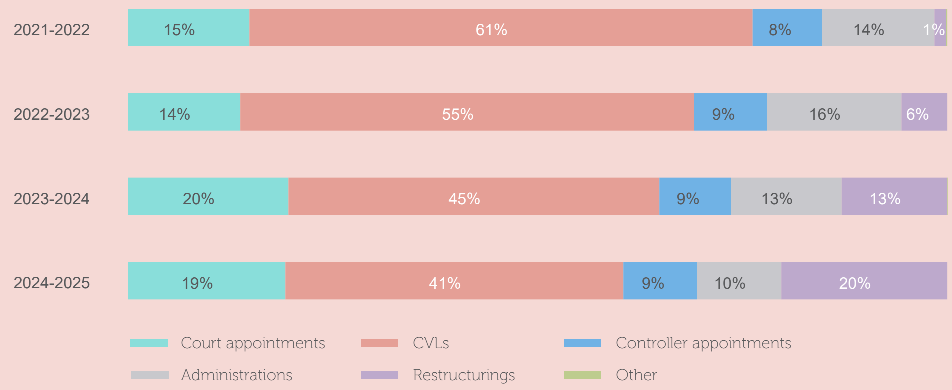
ASIC's Insolvency Statistics released on 28 January 2025 showed that more companies are choosing to restructure.

"Interestingly, in 2021-2022 restructurings only took up 1% of the total number of companies that entered into administration for the first time; by 2024-2025 this increased to 20%, which we believe is due to the continued distress in SMEs, which are seeking access to the small business restructuring (SBR) regime.

Further analysis of ASIC's recent Insolvency Statistics shows that out of the total number of companies that chose restructuring, a considerable portion are from the construction industry (21-29%), and accommodation and food services (21-24%)."

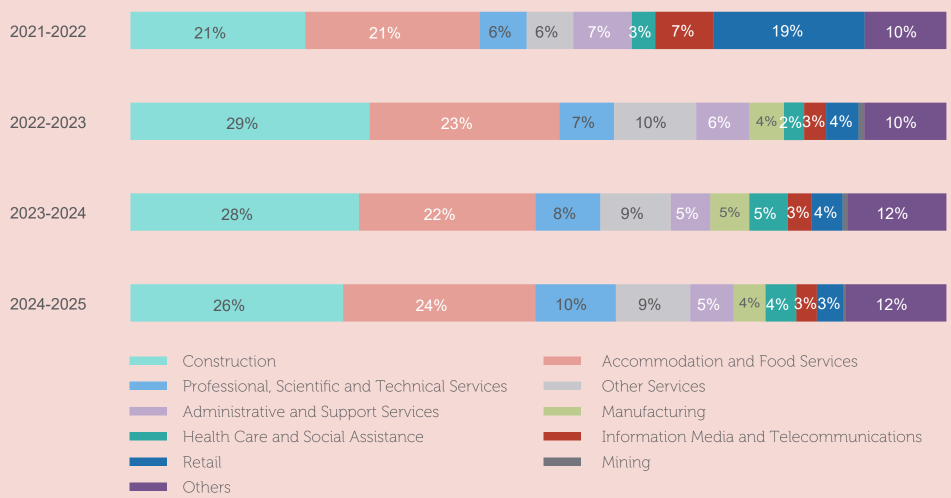
Michael Hughes

Figure 2: The growth in small business restructuring



Source: ASIC Insolvency Statistics (released 28 January 2025)
Insolvency data by appointment (% of total financial year-to-date)

Figure 3: Most insolvencies in construction, accommodation and food services



Source: ASIC Insolvency Statistics (released 28 January 2025)
Insolvency data by industry (% of total financial year-to-date and chose restructuring)

Click through to the relevant sections of the report

- Industry and sector trends
- Safe harbour
- Loan to own
- Creditors' schemes of arrangement

A note from our authors

Welcome to the 2025 edition of the MinterEllison Debt Restructuring Report. In the past year, there has been a notable increase in the number of businesses facing insolvency and appointing administrators. This report delves into this trend, examining which industries are most impacted and why.

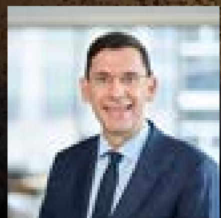
Our aim is to provide readers with a comprehensive understanding of the current landscape and focus on some developments in restructuring which are becoming increasingly important to successfully achieve positive restructuring outcomes.

In this edition, we focus on three key aspects of restructuring: safe harbour, loan to own, and the strategic use of creditors' schemes of arrangement. These key areas have been selected due to their increasing relevance and effectiveness in debt restructuring.

We hope this report serves as a valuable resource for understanding and implementing successful restructuring outcomes.

We wish to thank Ron Forster for his contributions to this report.

Michael Hughes
Partner
Restructuring & Insolvency



Michael Scarf
Partner
M&A/Capital Markets/Restructuring

Industry and sector trends

- Construction: Built to last?
- Hospitality: Closed for business
- Mining & Resources: The commodity cool off

Construction: Built to last?

According to ASIC's Insolvency Statistics, the construction sector had 2,977 companies enter external administration, representing the largest number of constituents during FY24. It is still the highest at FY25 (6 months YTD starting July 2024). We believe this was driven by:

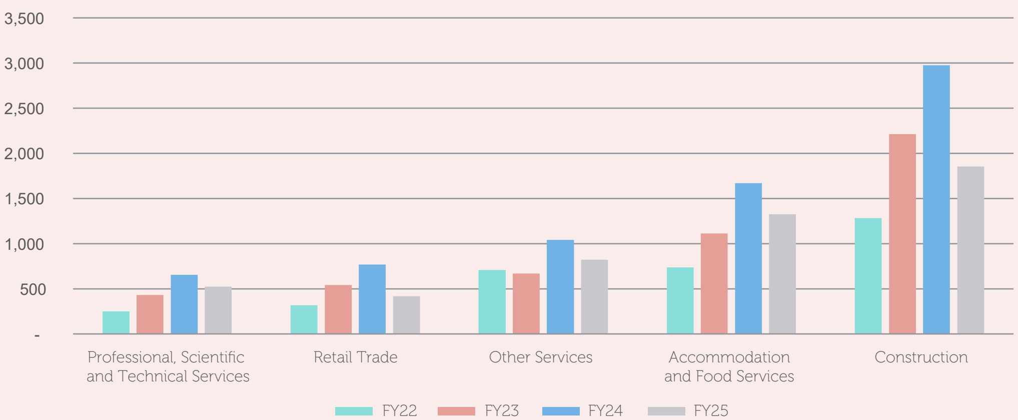
- **Higher construction costs :** according to CoreLogic's Cordell Construction Cost Index, costs have increased by 30.8% since COVID-19, and there has been a 3.4% uptick in December 2024 (the largest annual increase since September 2023). Disruptions in the global supply chain during the pandemic also contributed to this rise. But in recent months, while there were increases and decreases across the different cost categories, labour continues to be a key driver of cost increases according to CoreLogic.
- **Labour shortages :** there has been a shortage of talent in the industry due to low wages and the high cost of living.
- **Decline in housing demand :** new dwelling purchases have seen a decline. Builders are reportedly offering discounts and promotional offers to entice business, putting further pressure on margins.
- **Other factors :** such as extreme weather events that disrupt programs and inflate costs (with contingency budgets rising 2% on some projects), and also insurance premiums which increased 6-8% over the last year.

In response to various external pressures, construction firms and property developers have been adopting a more cautious approach, including delaying or cancelling projects.

Nevertheless, industry experts predict that financial pressure will persist into the foreseeable future, unless significant reforms are made. In the meantime, several property and construction firms have already entered voluntary administration, including these larger ones:

- Roberts Co Australia in May 2025
- Bensons Property Group in December 2024
- Stevens Construction in May 2024
- Porter Davis Homes in March 2023
- Clough Group in December 2022
- Probuild and WBHO Australia in March 2022

Figure 4: Construction firms had the highest # of insolvencies



Source: ASIC Insolvency Statistics (released 28 January 2025) Insolvency data (total financial year-to-date)

Hospitality: Closed for business

The second highest number of companies that faced insolvency were in the hospitality industry (accommodation & food services), according to ASIC's Insolvency Statistics.

This was further reinforced by CreditorWatch in its latest Business Risk Index, which cited that the Food and Beverage Services industry leads the rankings for the business failure rate, late payments, and ATO tax debt defaults over A$100,000 – and is ranked second for payment defaults.

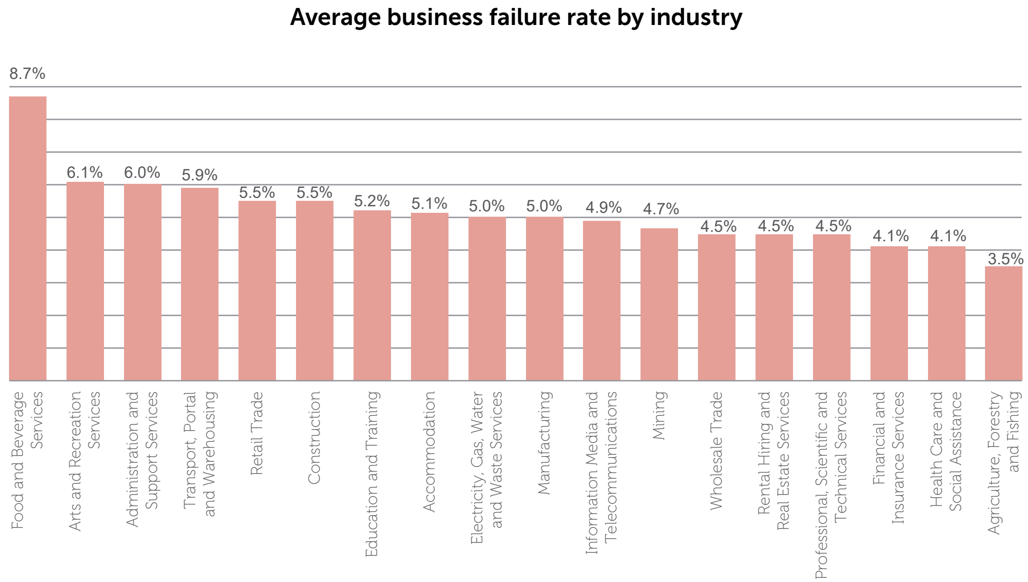
Businesses in the sector have been struggling to maintain profitability due to ongoing cost pressures, higher interest rates, wage increases, labour shortages and softer consumer demand.

Cost-of-living pressures have also pushed some households to tighten their purse strings and cutback on discretionary spending, which the hospitality industry is heavily reliant on. It's anticipated that revenue and cost pressures will persist unless interest rates are lowered and demand/supply issues are resolved.

Notable hospitality insolvencies and closures:

- **Carl's Jr Australia:** the US company's Australian franchise entered into voluntary administration in July 2024 due to operating losses. It opened its first store in Australia in 2016, and operated 24 restaurants by the time it collapsed;
- **Good Group Australia:** the Australian company entered into voluntary administration in May 2024 due to unpaid debts and operating losses. It employed around 200 staff and owned several fine dining restaurants such as Botswana Butchery, White and Wong's - located in Sydney, Melbourne and Canberra;
- **Public Hospitality** lost control of five venues after credit investor Muzinich & Co terminated a refinancing deal and appointed insolvency firm FTI Consulting to manage Oxford House, The Norfolk Hotel, The Strand Hotel, the Camelia Grove Hotel and The Exchange Hotel. Public Hospitality announced its restructure in June 2024 and secured a reported A$400 million refinanced deal in August 2024. It stated this would allow it to "undertake significant property improvements" to hotels located in Bondi, Darlinghurst, Potts Point and Annandale;

Figure 5: Food and Beverage industry has the highest failure rate %



Data source: ASIC database direct link, CreditorWatch industry data; Business failure rate is defined as voluntary and involuntary administrations, ASIC strike-offs and voluntary business deregistrations.

- **Melbourne** saw many closures of locally-known places such as Food Star Sunshine, (popular buffet restaurant that operated for 25 years), The Olive Jar, (Italian restaurant that operated for 40 years), Izakaya Den, Rosetta, Gingerboy (Asian fusion eatery that operated for 18 years), Pie Thief, Mali Bakes and La Porchetta;
- **Sydney** also saw its fair share of closures, such as La Giara (Italian restaurant that operated for 25 years), Tetsuya's (operated by industry heavyweight Tetsuya Wakuda), Raja, Izakaya Tempura Kuon, Tequila Daisy, Redbird Chinese, Lucky Kwong, Khanaa and Cornersmith; and
- **Canberra** was also affected, with closures including Miss Van's (Vietnamese restaurant), Aubergine, Temporada and XO.

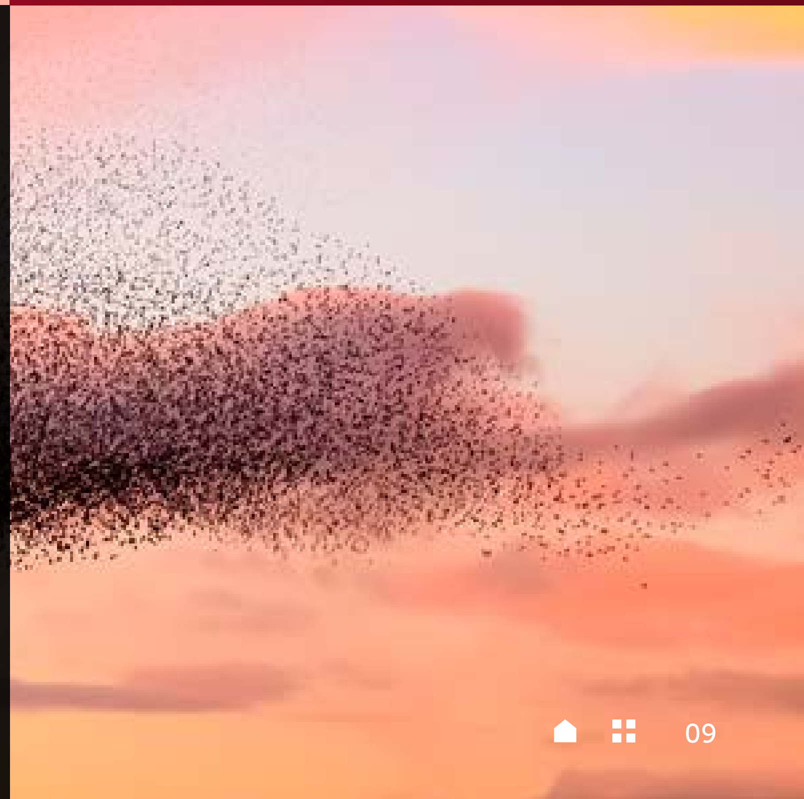
Mining & Resources: The commodity cool off

ASIC Insolvency data didn't show a high number of mining firms enter into administration for the first time. However, several miners are experiencing significant economic stress due to lower commodity prices, such as lithium, nickel and iron ore.

Notable insolvencies in mining:

- **Jervois Global:** filed for restructuring, and delisted in January 2025 as cobalt prices had plummeted by 72% since April 2022 (driven by oversupply and China's stronghold on global production). In May 2025, it was privatised with a A$145 million injection from Millstreet Capital Management. The recapitalisation left shareholders like AustralianSuper and Mercuria deep in the red;
- **Aeon Metals (ASX:AML):** the mineral exploration and development business owns Walford Creek, one of the highest grade substantial cobalt resources in Australia. It entered into voluntary administration in July 2024 and FTI Consulting was appointed to operate the business and assess possible restructuring options. Aeon Metals became subject to a DOCA to provide for its restructure, which completed following the transfer of all its shares to OL Master Limited;
- **Elmore Ltd (ASX:ELE):** the miner that operated Peko mine (iron ore, gold) in Tennant Creek in the Northern Territory was placed into voluntary administration in September 2024 after continued operating losses and increasing debts (A$6.72 million in revenues, but A$23.5 million in losses, in 2022-2023);
- **Orexplore Technologies (ASX:OST):** a research, development, sale, and provider of core scanning services for mining companies. It was formerly an orebody intelligence company, spun off from Swick Mining Services in 2021. In August 2023, the company was able to sign a binding A$1.55 million agreement with BHP (ASX:BHP) for a field deployment at the Carrapateena Mine in South Australia. However, a year later, it entered into voluntary administration; and
- **Wiluna Mining (ASX:WMC):** an Australian gold producer with considerable resources (5.5 million ounces of gold resources). However, it had insufficient working capital to bridge a project to complete the development of a reset mine plan due to increasing cost pressures, tightening terms of creditor payments, the impact of COVID-19 on staff availability, project ramp-up issues, and worldwide shipping constraints. It was placed into voluntary administration in July 2022.

Strategy 1:
Safe harbour



Strategy 1: Safe harbour

The insolvent trading "safe harbour" can enable directors to pursue debt restructuring of a company at risk of insolvency without having to place the company into external administration.

As explored later in this report, what has developed in practice since the introduction of the safe harbour protection is for company directors to seek tailored restructuring advice from legal and financial professionals – advice that is updated regularly as the process evolves to provide comfort on the continued existence of the protection.

But what does the safe harbour protection really mean for companies in distress?

The safe harbour defence is not universally available. It is off the table if a company is not paying employee entitlements as they fall due, fails to meet its lodgement obligations under the Income Tax Assessment Act 1997 (Cth) or the A New Tax System (Goods and Services Tax) Act 1999 (Cth), or if its financial records are inadequate.

This means safe harbour may have limited appeal in restructuring small to medium businesses. Often, the only option will be to pursue the restructuring via voluntary administration and a deed of company arrangement (DOCA), which will typically require employee entitlements to be paid in full, although the company's tax debts can be compromised.

The safe harbour plan must pass the better outcome test

It must be "reasonably likely" to lead to a better outcome than the immediate appointment of an administrator or liquidator.

Directors should consider, analyse and document all of the potential outcomes that will follow if an administrator or liquidator is appointed, and ensure these records accompany the expected outcome of the plan. It is not self-evident that any outcome must be better than administration or liquidation, particularly where the company is not expected to continue as a going concern and/or existing creditors are not expected to be paid in full.

"

Directors have a positive duty to prevent insolvent trading, i.e. from incurring debts when a company is insolvent, and they know or should have known, that the company was insolvent at the time. But there is now a 'safe harbour' protection to prevent claims arising from debts incurred, directly or indirectly, in connection with the development and implementation of a course or courses of action (i.e. a plan), reasonably likely to lead to a better outcome than the immediate appointment of an administrator or liquidator. A debt restructuring can be, or form a part of, such a plan.

The 'safe harbour' protection from personal liability on directors for insolvent trading is designed to enable director-led restructurings and facilitate a better outcome for creditors – and potentially shareholders – rather than the directors being required to appoint an administrator when insolvency is inevitable."

Michael Hughes

The plan does not have to be fail-safe or guaranteed

It only has to be "reasonably likely" to pass the better outcome test. The Explanatory Memorandum for the legislation which introduced safe harbour said it does not require a better than 50% chance of success. "Reasonably likely" requires there to be a chance of achieving a better outcome which is not fanciful or remote, but is fair, sufficient and worth noting. Directors need to be conscious of potential insurmountable road blocks, especially where the implementation of the plan requires further and ongoing negotiations with a broad range of stakeholders, whose final position is not known. The argument will be that the plan was doomed from the outset and so the better outcome test is not passed.

Directors also need to take care that the advice they receive covers all aspects of the pre-conditions for the safe harbour protection to apply.

For example, it's not helpful if the advice assumes that the company is in compliance with its tax return filing obligations and up to date in paying employee entitlements because, if these pre-conditions are not satisfied, the safe harbour protection will not be available. Accordingly, it's important for these matters to be addressed by qualified and experienced external advisers as part of directors seeking safe harbour advice.

"

We recommend that directors obtain advice from competent, reliable and appropriately qualified advisors about the financial position of the company, how the financial difficulties can be addressed, and whether the plan passes the better outcome test.

These parties are usually experienced insolvency practitioners, normally accountants acting together with lawyers, because the analysis is usually both commercial and legally focused. The engagement needs to be managed carefully, because it is advice provided to the directors. If it is also provided to the company, any legal privilege attaching to it may be lost if the company enters external administration. Failure to take advice may impact the ability to access the safe harbour."

Michael Scarf

Safe harbour: 6 takeaways

- **Directors' duties still apply:** Directors must continue to comply with core legal duties – including acting in the company's best interests and avoiding conflicts of interest. They must not use their position as directors to gain an advantage for someone else, or cause detriment to the company, nor improperly use information obtained in a capacity as a director to gain an advantage for them or someone else or cause detriment to the company. Caution is especially required if directors are linked to parties involved in the proposed restructure;
- **Safe harbour doesn't protect against tax liability:** This strategy offers no defence against personal liability for unpaid company tax. If a Director Penalty Notice is issued by the ATO, directors may be compelled to act quickly—often by appointing a voluntary administrator within 21 days;
- **Timing is critical:** The better outcome test under safe harbour compares outcomes against the immediate appointment of an administrator or liquidator. Directors may be protected while planning a future formal administration if it ultimately delivers better returns to creditors;
- **Taking delayed action can backfire:** Prolonging restructuring outside formal administration can reduce the effectiveness of a future DOCA. If markets are already exhausted by the time an administrator is appointed, liquidation may become the only viable outcome – even if safe harbour initially applied;
- **Limited transparency and legal guidance:** Most safe harbour assignments are confidential, with little judicial interpretation to date. However, recent guidance from ASIC (Regulatory Guide 217, Duty to Prevent Insolvent Trading: Guide for Directors, Dec 2024) and Treasury (Review dated 23 November 2021) provides helpful direction; and
- **Lender support is encouraging:** Major Australian banks have shown broad support for companies operating under safe harbour, preferring to assess enforcement options only after formal administration is initiated.

"As you can see, timing is of the essence when using safe harbour as a debt restructuring strategy."

"In other words, safe harbour can be used to protect directors while they plan for the appointment of an administrator, on the basis that, for example, the immediate appointment of an administrator or liquidator may result in a nominal return to creditors, but a planned DOCA will result in a better return for them, and potentially a broader 'class of creditors'."

"For example, the plan could involve the appointment of an administrator to facilitate a restructure where an incoming sponsor is prepared to acquire all the equity for a nominal value under a DOCA in exchange for an agreed return to creditors."

Michael Hughes

Strategy 2: Loan to own

Strategy 2: Loan to own

Loan to own structures are becoming more common for distressed companies

Over the last few years we've seen an increase in the number of strategic buyers undertaking "loan to own" transactions when companies are in financial distress.

While not a legal term, loan to own broadly refers to a strategy where a lender uses secured debt to gain control of a company or its key assets.

In some cases, the primary secured creditor – though not a strategic buyer – may be willing to exchange part or all of its debt for a controlling equity stake in the debtor company.

For a loan to own approach to be viable, the existing creditors must be willing to trade their debt.

While Australia hasn't had a particularly active secondary market in debt trading, there are signs this could be changing. The major banks often don't wish to be seen to trade their debt for reputational reasons, but new multi-lender loan facility arrangements are increasingly being structured to allow debt to be on-sold more easily. Also, the rise of private credit funds in the Australian market has the potential to increase both the number of buyers and sellers of debt on the secondary market. In this respect, Australia may catch up to other jurisdictions such as the USA and the UK where loan to own or credit bid transactions are relatively common.

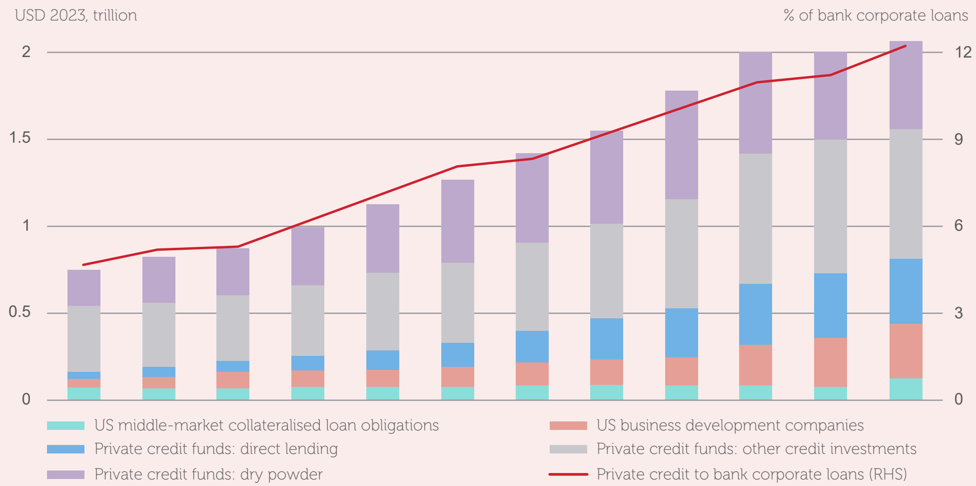
Over the last few years, the number of private credit firms, predominantly in the USA, has risen significantly. It is reported that private credit now accounts for almost **12%** of American businesses and the corporate lending market, a material increase over the past few years.

These private credit firms have been expanding internationally, with some making their way into Australia.

"The goal is typically to repair the balance sheet, giving the company time to trade out of its financial distress and potentially restore value for both creditors and shareholders."

Michael Scarf

Figure 6: Private credit continues to rise in advanced economies



Source: Houlihan Lokey; IMF; Pitchbook; and OECD calculations

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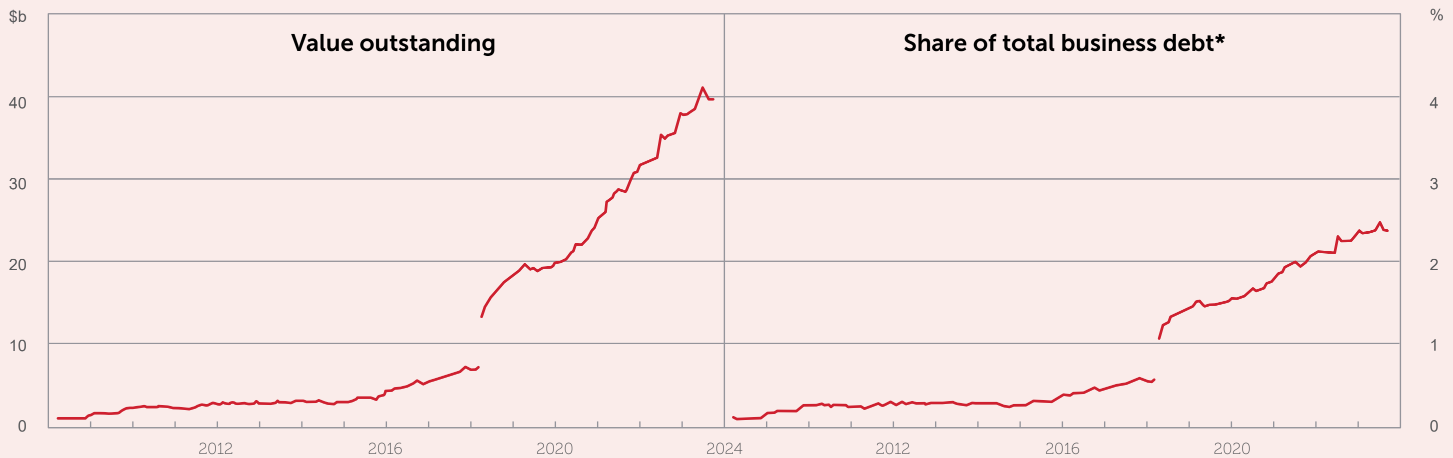
The growth in private credit is likely to mean that these situations will occur more frequently - with increasing buyers and sellers of debt on the secondary market."

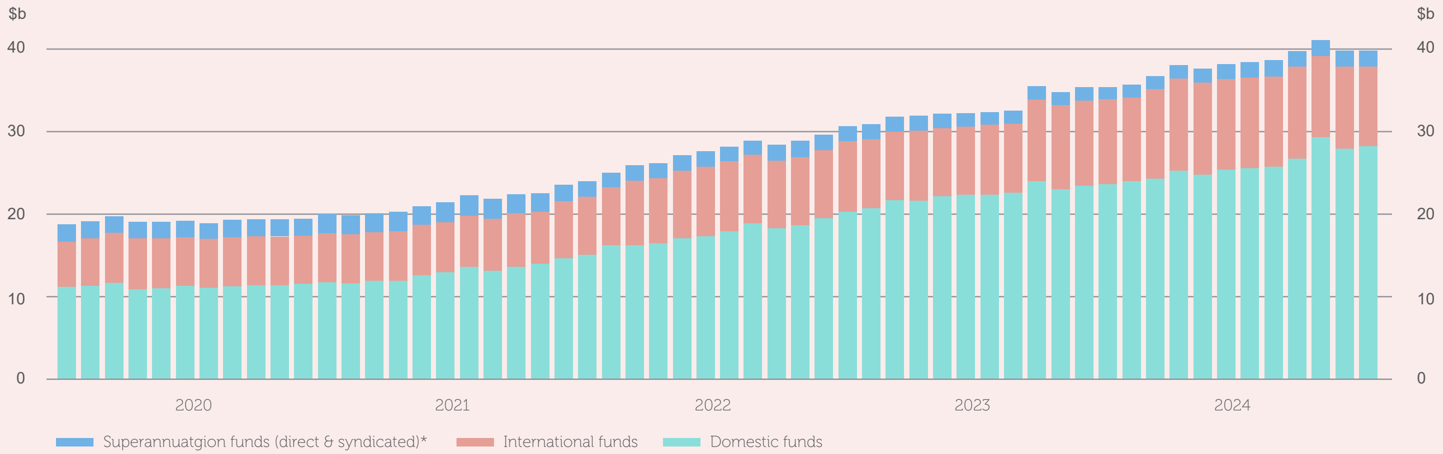
Ron Forster

Figure 7: Private credit market share in Australia



Source: APRA, LSEG, RBA

Figure 8: Private credit outstanding (A$bn) in Australia



Source: APRA, LSEG, RBA

Deployment of Australia-focused private credit is now close to A$40 billion, doubling in the last four years

Data from the Reserve Bank of Australia (RBA) shows that private credit accounts for 2.5% of total business debt, doubling its share over the last five years. Capturing data from 200 lenders, the RBA estimates that outstanding private credit in Australia is A$40 billion, doubling from 2020, as domestic private credit funds that accounted for 70% of the A$40 billion have contributed the most to lending growth.

However, the RBA recognises that its estimates for the private credit markets are limited, as some deals aren't captured given that the market continues to have opaque reporting and structures, i.e. non-syndicated lending from overseas institutions that don't report to the Australian Prudential Regulation Authority (APRA). Regulators can play a key role in improving transparency to monitor growth in private credit and the potential risks to financial stability.

In a loan to own situation, the debt being traded would usually be in a debtor company which was either in default under its loan facilities, or possibly under a current standstill arrangement with its creditors.

Or, if not currently in default, it would be likely to be in default in the near term – whether due to anticipated covenant breaches or an inability to repay on a loan maturity date coming up in the near future. In these situations, the debt is likely to trade on the secondary market at below par or face value.

There is also a 'value' issue for the potential purchaser of the debt.

The purchaser of the debt seeking the value of the assets would acquire security over as part of the debt purchase to be at least as much as the amount paid for the debt. This would then represent the floor price for the debt purchaser, with the potential to obtain higher returns on a successful restructuring.

There are a number of methods by which a loan to own strategy can be implemented, each with their own requirements, advantages and disadvantages.

Below we provide a brief overview of the main approaches, exploring the pros and cons in some examples. The following four approaches are discussed:

1. **An agreed loan to own structure;**
2. **A creditors' scheme of arrangement;**
3. **Deed of company arrangement (DOCA) and compulsory share transfer; and**
4. **Receiver appointment and credit bid.**

A multinational debtor with operations or assets in Australia may seek to adopt a restructuring or insolvency process in a foreign jurisdiction such as US Chapter 11 proceedings. While the foreign process may provide a stay or moratorium on creditor claims in that foreign jurisdiction, it does not automatically extend to Australia. Creditors remain free to seek to enforce security over, and pursue, Australian assets.

The foreign process will not be effective to implement a loan to own or debt for equity swap in terms of Australian assets without formal recognition in Australia (if available), or by implementing the restructuring steps in accordance with applicable Australian laws.

One recent example of an agreed loan to own structure involved Accolade Wines, one of Australia's largest wine producers situated in Adelaide, owned by a UK holding company. In this case, private equity firm Carlyle owned the equity, the debt of the Group included a £301 million Term Loan B due in June 2025, as well as a A$150 million revolving credit facility due in June 2024.

Bain Capital was already a holder of a portion of the debt and, together with Samuel Terry Asset Management, acquired a large proportion of the outstanding secured debt at a significant discount to the par value of the debt.

Following the debt purchase, Bain Capital and Samuel Terry were able to negotiate the purchase of all the equity from Carlyle at a very significant discount to Carlyle's purchase price, while providing additional funding and restructuring the equity loan arrangements.

Pros and Cons

Pros: There are several advantages of an agreed approach, including the faster time to complete the transactions, less disruption to the business as there is no formal external appointment, less or no adverse publicity, and fewer costs involved.

Cons: A disadvantage of the consensual approach depends upon the terms of the debt facility. It will often require agreement with each of the creditors, which may not be possible if there are many creditors. Also, different security structures between lenders makes it more difficult to obtain consent from all lenders across the different security arrangements.

1 An agreed loan to own structure

This would be the preferred approach and is most suited to a situation where the debtor company has few shareholders, and a small group of lenders providing the main secured funding.

2 Creditors' scheme of arrangement

The process for a creditors' scheme of arrangement is outlined in the next section of this report. In the context of a loan to own transaction, essentially the debt would be converted into equity where one, or a group of creditors, would convert their debt to acquire 50% or more of the equity of the debtor company (being a controlling stake).

In the context of a listed public company, the creditors may end up with somewhere between 35% to 49% of the issued shares which, depending on the share structure, would usually deliver practical control.

Typically, a creditors' scheme of arrangement process would be implemented after finalising the restructuring support agreement where a sufficient number of creditors agree to the debt for equity conversion via the scheme, and the debtor company agrees to implement the scheme in accordance with an approved timetable.

Ideally, a sufficient number of creditors would be a party to the restructuring support agreement (and agree to vote in favour of the scheme), so that the approval threshold at the required scheme meeting of creditors can be obtained.

The required statutory majority at a scheme meeting of a particular class of creditors is creditors voting in favour (in person or by proxy) that hold:

- 75% by value of the relevant debt; and
- a majority number of the creditors.

In recent years, there have been a number of examples of creditors' schemes of arrangement being used to convert debt into equity, resulting in lenders collectively receiving more than 50% of the debtor company's total issued share capital.

4 examples of loan to own via creditors' scheme of arrangement

Boart Longyear.

One of the most significant examples of the scheme process being used as part of a loan to own transaction is the restructure of Boart Longyear.[1]

A detailed description of this restructure is described on pages 17 to 20 of this paper's 2nd edition, available here.

In summary, in 2021, Boart Longyear implemented two inter-conditional creditors' schemes involving secured and unsecured finance creditors. Through this process, approximately A$1.1 billion of debt was converted into 98.5% of the equity in the restructured company.

Boart Longyear was also listed on the Australian Stock Exchange (ASX) and the restructure required shareholder approval which was obtained despite shareholders being collectively diluted to hold just 1.5% of the company's equity after the restructure. Boart Longyear shareholders approved the restructure, because if it was not approved, they would have been unlikely to receive any return.

Tiger Resources.

The restructure of Tiger Resources is another example of a creditors' scheme to implement a debt for equity swap – where the largest senior lender, Taurus Mining Finance Fund, was issued a controlling equity holding of 64.9% after the restructure (having held 13% before the restructure).

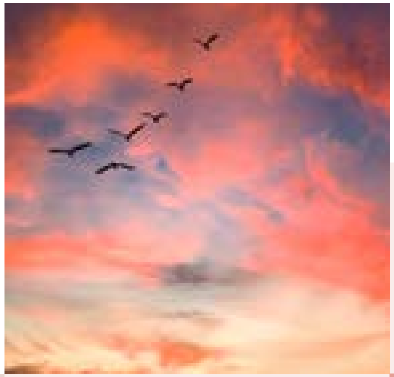
In summary, US$221.1 million of debt held by three lenders was reduced to US$70 million in exchange for approximately 99% of the equity being divided on a proportional basis amongst the lenders, with the Taurus Mining Finance Fund being the largest.

Nine Entertainment Co.

The Nine Entertainment scheme saw senior lenders Oaktree and Apollo Global Management convert A$2.3 billion of debt into 95.5% of Nine Entertainment's equity. Despite objections from a minority of senior lenders holding 12% of the debt, the approval threshold was met, and the Court ultimately approved the scheme.

BIS Industries.

BIS Industries, a resources logistics company, used a creditors' scheme to reduce its senior debt from A$700 million to A$238 million, in exchange for issuing 96% of the company's equity to its senior secured lenders.



1. MinterEllison acted for Centerbridge Partners on the restructure, it being the major shareholder and one of the major lenders.

Creditors' scheme of arrangement

5 advantages:

- **the company can continue to trade throughout the process,** as it is not necessary for there to be some form of external administration. The process is company or director-led;
- **disruption to the business is minimal,** as the board continues to control the business of the company;
- **the scheme process can bind all scheme creditors,** including secured creditors (unlike a DOCA where secured creditors are not bound if they do not vote in favour);
- **the scheme process is flexible.** Not all creditors need to be included (unlike a DOCA). There can be different classes of creditors to accommodate secured and unsecured loans with lenders. Also, if the debtor company is subject to class actions, as is sometimes the case, the scheme process can capture the class action claims, or subordinated claims, and these can be extinguished. No subordinated class member meeting is required if the independent expert reports that there is no value remaining to shareholders; and
- **once a restructuring support agreement is entered into proposing a creditors' scheme, stay orders can be sought from the Court** under s 411(16) of the Corporations Act to prevent any creditor taking enforcement action while the scheme process is being implemented. These interim orders can be recognised in foreign jurisdictions such as the USA and UK to prevent overseas creditors from taking enforcement action in those jurisdictions whilst the scheme is being implemented.

The main disadvantages of a creditors' scheme are that the process can take some months to implement from start to finish, and the process can be costly (particularly given the recent increase in ASIC scheme fees).

It is also necessary for the relevant creditors voting in favour of the scheme to satisfy the required 75% by value of relevant debt and 50% by number of creditors voting threshold (outlined above). This compares with the lower threshold of 50% of the value of the debt held by relevant creditors and 50% of the number of creditors to approve a DOCA.

3 Deed of company arrangement (DOCA) and compulsory share transfer

Directors of an insolvent company, or one nearing insolvency, may enter into voluntary administration. The appointment of a voluntary administrator suspends the powers of the directors, with the administrator taking control and managing the business and affairs of the company.

Voluntary administration provides a general statutory moratorium on the enforcement of creditor claims (but not those of a secured creditor), who holds security over the whole or substantially whole of the debtor's property. Among other advantages, the moratorium on creditor claims provides an opportunity for a restructure proposal to be put to creditors.

A DOCA can be used in a voluntary administration to implement a debt restructuring, or specifically a loan to own strategy which is approved by a majority of creditors. A DOCA can achieve multiple purposes and provide flexibile outcomes. The DOCA can include arrangements to recapitalise the company, restructure the business, compromise certain creditor claims or implement a debt for equity swap.

A loan to own strategy can be implemented in several ways using a DOCA, including acquiring all the shares in subsidiary companies, or all of the relevant assets, in exchange for releasing the debt.

A DOCA carries a lower voting threshold than for a creditors' scheme of arrangement, requiring 50% in value of the debt and 50% in number of creditors. However, a DOCA is only binding on secured creditors who vote in favour of the DOCA and cannot release third party claims.

Unlike a creditors' scheme of arrangement, a DOCA does not require Court approval (unless the s 444GA process is used to transfer shares in the debtor company for no consideration – see page 21) and generally avoids the costs of a Court process.

Strategy 2: Loan to own

Compulsory share transfer as part of a DOCA

In some cases, it may be advantageous to acquire all the shares in the holding company which is in administration (rather that its assets or just the shares in subsidiaries).

For example, where there are substantial tax losses in the holding company.

Pursuant to s 444GA of the Corporations Act, a deed administrator under a DOCA can seek leave of the Court to compulsorily transfer the shares in the company under administration for no consideration and without shareholder approval.

Hence, a proponent of a DOCA wishing to acquire 100% of the shares of the company in administration can achieve this using the s 444GA process.

The Court will be prepared to grant leave if the deed administrator can demonstrate that the transfer would not unfairly prejudice the interests of the company's shareholders. This requires the Court to consider the impact of a compulsory share transfer on shareholders where there may be some residual value in the company.

A shareholder, creditor or other interested person (e.g. ASIC) may oppose an application for the Court's leave to approve a transfer of shares. The Court would need to consider whether the shares have any residual value.

It would be difficult to demonstrate any prejudice if the company has no residual value to its shareholders, so that the shares have no value, and shareholders are unlikely to receive any distribution in a winding up.

If a winding up is, or is likely to be, the only alternative to the DOCA including a transfer of shares for no consideration, the Court will consider a valuation of the company's assets and liabilities in a liquidation scenario.

If the company's assets are insufficient to discharge its debts (i.e. no return on equity), then the shares would have no residual value.

It is generally the case that the value of the distressed company is less than its outstanding debt.

ASIC plays a role where the DOCA contemplates a transfer of shares in a listed company or unlisted company with more than 50 members, which is subject to the Australian takeover rules. Before granting a waiver to permit an acquisition of shares that would otherwise breach the takeover rules, ASIC requires:

- an independent expert's report (IER) be prepared by an expert other than the administrator, with the valuation prepared on a liquidation basis (generally the case) or, depending on the likely consequences for the company if the share transfer is not approved, a going concern basis;
- shareholders are provided with explanatory materials (including the IER) at least 14 days before the Court hearing;
- the IER concludes there is no residual value in the shares; and
- the Court grants leave to transfer the shares.

6 examples of s 444GA process with a DOCA

Openpay Group Limited

Openpay, a buy now pay later business, incurred a pre-tax consolidated loss of A$82.5 million in FY22 and came into breach of its loan covenants with its senior secured lenders in early 2023, with its shares ceasing to trade on the ASX. Two secured creditors appointed receivers and managers over the assets and operations of Openpay, who undertook a sale process of the company's assets.

Openpay subsequently entered voluntary administration in November 2023, after certain Openpay assets were sold to a secured creditor. The administrators proposed a DOCA to restructure the company's debts and facilitate a sale. The secured creditor ultimately entered into a DOCA in January 2024, pursuant to which the shares in Openpay were transferred by the deed administrators to the secured creditor.

Catalano Seafood Ltd

Catalano, a seafood business, entered into voluntary administration in October 2023, facing significant financial challenges. Catalano had incurred losses for five consecutive years, had high operational costs and significant debts, including secured debts to National Australia Bank and Capital Finance. These factors left Catalano in an unsustainable financial position, resulting in it entering into voluntary administration with the aim to restructure the business.

Avior Capital proposed a DOCA to restructure Catalano's debts and ensure its continued operation, with it taking operational control of the business and ultimately acquiring 100% ownership of Catalano.

The administrators recommended the DOCA with Avior Asset Management Pty Ltd (Avior) as the proponent providing a capital injection to address Catalano's financial issues. Avior provided a A$1.7 million loan to pay out secured creditors (National Australia Bank and Capital Finance). The DOCA included priority payments to employees.

The DOCA was approved by creditors and the transaction was implemented by a s 444GA transfer of shares in Catalano to Avior, following Court approval for the compulsory transfer of the shares and ASIC relief to permit the transfer of shares.

Collection House Limited

Collection House, a debt collection provider facing significant financial difficulties, entered into voluntary administration in June 2022. The company had experienced significant financial losses, with its last half year accounts showing a loss of A$63.7 million and its auditors warning of material uncertainty as to the company's ability to continue as a going concern.

Its business included the purchase of debt at deep discounts, and it had suffered significant impacts to the value of its debt ledger. Prior to entering into administration, Collection House had sought to reduce operational costs, and reduce its debt load and preserve cash by selling off its assets, including the sale of a significant portion of its purchased debt ledger to Credit Corp Group Limited.

Despite these efforts, voluntary administrators were appointed in June 2022 who undertook a dual track sale and recapitalisation process. Credit Corp became the successful bidder in the process. The administrators entered into binding transaction documents with Credit Corp and recommended a DOCA with Credit Corp. The DOCA contemplated the restructuring of Collection House's debts and obligations to enable it to continue operations under Credit Corp's ownership. It prioritised payment to secured creditors, including repayment of a Westpac facility.

The DOCA was approved by creditors and the transaction was implemented by a s 444GA transfer of shares in Collection House to Credit Corp. As an ASX listed entity, ASIC relief was required to permit the transfer of shares, in addition to Court approval. The business was able to continue trading throughout the administration.

The PAS Group Limited

The PAS Group, an Australian fashion retailer, entered voluntary administration in May 2020 due to financial difficulties exacerbated by the COVID-19 pandemic.

The administrators proposed a DOCA to restructure the company's debts and facilitate a sale. Ultimately, a DOCA was executed by The PAS Group and its related companies. Shares were transferred to The PAS Group International Pty Ltd, following Court approval for the compulsory transfer of all shares in The PAS Group to The PAS Group International , and ASIC relief to permit the transfer of shares.

Oroton Group

Oroton appointed voluntary administrators on 30 November 2017 after a continued decline in earnings and a strategic review to improve the overall performance of the business failed to secure any formal offers to purchase or recapitalise the business.

Oroton received credit support from a major shareholder up to an amount of A$3 million and entered into a secured A$35 million facilities agreement with Westpac in 2015, and the term was extended from October 2017 to April 2018.

Westpac and the major shareholder entered into a put and call option, because there were concerns regarding the Westpac debt and security over Oroton, and the rights were exercised in November 2017. Westpac assigned all amounts owing to it under a working capital facility to the major shareholder.

Under the independent sale and recapitalisation process conducted by the administrators, Oroton entered into an implementation deed granting exclusivity to the major shareholder (a secured creditor) as the major shareholder's proposal was considered a better alternative than the other offers received by the voluntary administrators (by comparing the estimated unsecured creditor return). The consideration provided by the major shareholder consisted of secured debt, employee entitlements for continuing employees and a top up amount which ensured a return to unsecured creditors (totalling A$24.45 million). A DOCA was entered into, subject to an order under s 444GA, transferring shares in the company and thereby control to the major shareholder.

MinterEllison acted for the purchaser in relation to the restructure and acquisition of Oroton group through its administration and deed of company arrangement.

Ten Network Holdings Limited

Ten Network entered into voluntary administration in June 2017 facing significant financial difficulties, with the Commonwealth Bank of Australia (CBA) appointing receivers soon after.

A sale process was undertaken, inviting bids to recapitalise and/or acquire the network. The sale process culminated in Ten Network entering into an agreement for CBS to acquire Ten Network by a debt for equity swap. CBS was Ten Network's largest unsecured trade creditor, with a claim of A$843 million. Transaction documents were executed with CBS, and CBS funded a A$143 million facility to refinance Ten Network's secured debt and a working capital facility of A$30 million.

Ten Network creditors approved the CBS DOCA, and the process was finalised in November 2017 following Court approval for the compulsory transfer of all shares in Ten Network to CBS and ASIC relief to permit the transfer of shares.

MinterEllison was the sole legal adviser to the receivers and managers appointed to ASX-listed Australian media group, Network Ten, on all aspects of the transaction.

4 Receiver appointment and credit bid

A loan to own strategy can also be executed through a credit bid in receivership – a formal insolvency appointment that involves the enforcement of a secured creditor's security.

As part of its loan to own strategy, a debt investor seeking to acquire ownership of assets from a distressed company can look to acquire secured debt in the company in the secondary market (typically at a discount to face value) for a credit bid. Consideration of applicable debt transfer restrictions is required, although these commonly do not apply where there is a loan default.

The investor acquires the secured debt with the intention of enforcing the security of the loan, and then credit bidding during the sale of the secured assets.

A secured lender or creditor, with security over a debtor company or its assets, can make a credit bid in the sale of the secured assets by using the secured debt owed by the debtor to finance the acquisition. The creditor can effectively offset the purchase price against the value of its secured debt.

The credit bid would be for the face value of the debt purchased, even though the debt may have been acquired at a discount to face value.

Where a company is in default under the relevant loan and security agreements, and the secured creditor is entitled to appoint a receiver, the creditor can enforce its security by appointing a receiver over the secured assets or entities holding secured assets.

The creditor wishing to appoint a receiver and credit bid for the assets needs to ensure the security held is over the whole, or substantially the whole, of the debtor's assets and is enforceable. Otherwise, enforcement will be subject to the statutory moratorium on enforcement against the debtor or its assets, applicable where a voluntary administrator is first appointed (commonly where the debtors/guarantors are insolvent).

On appointment, a receiver will have the exclusive power to conduct a sale process over the secured assets. While the receiver acts for the benefit of the appointing secured creditor, the receiver will need to comply with their duties, including to undertake a proper sale process and take reasonable steps to achieve market value of the assets or the best price reasonably obtainable.

The secured creditor can participate in the sale process by making a credit bid and, if successful, using its secured debt to effectively set-off against some or all the consideration for the acquisition.

Where competing bids for the assets in the sale process fall short of the value of its total secured debt, the secured creditor can effectively outbid the competing bids, agreeing to forgo the value of the secured debt.

Alternatively, the secured creditor can simply refuse to release its securities for the competing bid unless the amount owing to the secured creditor is paid in full.

As a receiver must fulfil their duties and run a proper sale process, the secured creditor may find it difficult to ensure a successful credit bid upfront. Before undertaking this approach, a credit investor should give early and careful consideration to:

- **the security package:** whether there is valid and enforceable security over the whole, or substantially the whole, of the debtor's assets. Under a syndicated loan facility, security is held by a security trustee and while a lender could make a credit bid, any recovery will be subject to the terms of the facility and, unless released, the security remains subject to secured claims of other lenders;
- **whether the security is first ranking:** a secured lender that is not first ranking will need to carefully consider its strategy and take into account the applicable terms of any intercreditor agreement and, where the security is structurally subordinated to security over assets of the relevant company or its subsidiaries, how that security will be dealt with under its proposal;
- **debt transfer restrictions:** ensuring the ability to transfer the secured debt, taking into account any relevant conditions;
- **where the value breaks:** where the value breaks in the capital stack, to assist in determining the credit bid parameters and ensure the value of the company/ assets can be recouped;
- **the sale process:** the likely value of the secured assets in a public sale process, risks of value deterioration, potential for a successful credit bid, tax implications and regulatory approvals, e.g. Foreign Investment Review Board; and
- **secured asset due diligence:** any sale by a receiver will contain very limited warranties or indemnities and is unlikely to provide for deferred or contingent consideration.

Example of a receivership and credit bid

Basslink Pty Ltd and APA Group

Basslink operated the critical electricity interconnector between Tasmania and mainland Australia. Basslink and its related entities entered into voluntary administration and receivership in November 2021 as a result of incurring financial obligations after a major cable failure. There were ongoing disputes between Basslink, the Tasmanian State Government and Hydro Tasmania.

A syndicate of Australian and foreign lenders, holding the secured debt facility, which was in default with lapsed maturity dates, appointed receivers and managers.

The secured lenders appointed receivers with the aim of recovering the approximately A$625 million loan by selling the Basslink business and resolving the ongoing disputes. The receivers initiated an independent sale process for Basslink.

APA Group, an energy infrastructure business, acquired 100% of the senior secured debt from Basslink's lenders and replaced the appointed receivers. APA Group had expressed its interest in acquiring Basslink from the receivers.

The receivers conducted an independent and competitive sale process. APA Group became the preferred bidder and ultimately acquired Basslink out of receivership for A$773 million.

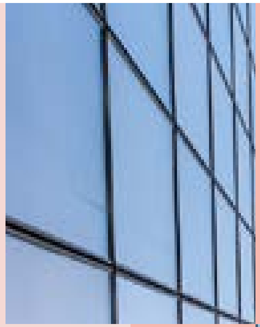
All secured creditor claims were satisfied in full and employee entitlements were assumed by APA Group which engaged the employees.

Strategy 3: Creditors' schemes of arrangement

Strategy 3:
Creditors' schemes of arrangement

An overview

- This strategy can be used as a preliminary step to gain more time to implement a restructuring at a later time.
- A creditors' scheme of arrangement is a process available to companies that are seeking to restructure, which facilitates the formation of a Court-approved, binding agreement between a company and its creditors or a class of creditors. The agreement involves creditors compromising their claims against the company in exchange for some form of consideration.
- Creditors' schemes offer a flexible mechanism which may renew the viability of the company and the profits to be derived from continuing to supply goods and services, facilitating an improvement of the company's liquidity position.
- The primary objective of a a creditors' scheme may be to enable the company to continue its business and to repay creditors from future profits or from a realisation of surplus assets. Concessions from creditors could be simply in terms of the time of repayment of debts (a 'standstill' or 'moratorium' scheme), or as to amount (e.g. through creditors writing off a portion of their debt) or a combination of these ('amend-and-extend schemes').
- Schemes have been in existence in Australian corporate law since the 1870s and were used as the primary tool for corporate restructuring prior to the introduction of voluntary administration and DOCAs in 1993.
- The schemes legislation is flexible and does not prescribe the limits of the transactions capable of being effected under a a scheme should take. For example, creditors' schemes have been used to deal with long-tail liabilities, pool assets and liabilities of several entities in a corporate group, release claims against third parties, and/or effect a debt-for-equity swap.
- Creditors' schemes have some advantages over DOCAs. Importantly, they can be used to bind dissenting minorities of secured creditors. By contrast, a DOCA only binds those secured creditors who vote in favour of it.
- Most Australian creditors' schemes in recent years may be considered to be 'deleveraging restructuring' (often involving debt-for-equity swaps), where the purpose has been to lower the company's debt to a sustainable level. In many of these cases, the debt being restructured is finance debt owed under syndicated loan facilities, bonds or notes. This report focuses on creditors' schemes which are designed to give the debtor company more breathing space to resolve its financial distress, rather than the scheme itself effecting a reduction in the debt.



Practical uses of creditors’ schemes of arrangement to allow distressed companies to gain more time to resolve their financial distress

Creditors’ schemes of arrangement have been frequently used in Australia as an effective way to implement a debt for equity swap to enable distressed companies to repair their balance sheets, where the scheme operates to convert some or all debt held by creditors into company shares. In many respects, such arrangements have offered a suitable and final solution to the financial distress of the company concerned. However, time is not often on the side of a company in financial distress, and it’s possible to use the flexibility of the scheme process to effect amendment to the loan arrangements to give the distressed company more time to develop solutions to resolve its financial pressure.

This report comments on various types of creditors’ schemes where existing loan terms have been amended to enable the debtor company to have additional breathing room. The scheme process in Australia was modelled on the UK legislation so we have drawn on both UK and Australian examples.

It would of course be possible to achieve accommodating amendments to loan facilities with the agreement of all the relevant lenders, or the requisite majority under the debt documents. However, the creditors’ scheme process is available when the required consent threshold under the relevant loan documentation is not achievable.

Often, consent thresholds can be as high as 100% of the lenders when it comes to issues such as extending the maturity date of the loan or waiving an event of default.

A creditors’ scheme can effectively amend the terms of loan documents if the scheme majority is met, even if this threshold is lower than that required under the terms of the loan documents.

The following category of creditors’ schemes will be discussed with examples:

1. **‘Standstill’ or ‘moratorium’ schemes; and**
2. **Amend and extend schemes.**

> “The creditors’ scheme process has been more frequently used in the UK by distressed companies as a uniform step to enable more time to implement a more comprehensive restructure than in Australia. However, given the flexibility of the scheme process, and the accommodating approach of the Australian courts, there is no reason why the creditor scheme process could not be utilised more frequently in Australia to relieve pressure on distressed companies to facilitate a more advantageous future outcome for creditors, shareholders and other stakeholders.”
>
> *Michael Scarf*

Implementing creditors' schemes of arrangement

Step 1: Prepare the scheme including the explanatory statement that will be provided to creditors (usually accompanied by an independent expert's report (IER) setting out whether the scheme is fair and reasonable to scheme creditors)

Step 2: Make an application to the court to convene a meeting (or meetings) of creditors for the creditors to vote on the scheme proposal

Step 3: Provide prior notice to ASIC so that it may comment on the scheme and draft explanatory statement (Corporations Act s 411(2))

Step 4: Provide notice to creditors of the court application so that they may seek leave to appear in court (minimum 21 days' notice period)

Step 5: Distribute the explanatory statement to creditors and convene a meeting of the class(es) of creditors covered by the scheme to vote on the scheme - approval must be given by a majority in number which must represent at least 75% of the value

Step 6: Provided that the creditors have approved the scheme at the scheme meeting, apply to the court for approval of the scheme (Corporations Act s 411(4)

Step 7: Provided that the scheme has been approved by the court, lodge the scheme with the Australian Securities and Investments Commission (ASIC)

Step 1 would typically involve:

- A booklet containing the explanatory statement and IER
- A statement of the scheme / chairman's letter
- A notice of meeting
- A directors' interest disclosure
- A report as to the company's affairs (see section 412(2) of the Corporations Act)
- An auditor's report (where an amalgamation is taking place)

10 advantages:

- Versatile - can be used to facilitate a variety of company restructures (whether solvent or insolvent)
- Can provide a solution to financial difficulty without the need for administration, liquidation or winding up - solvent debt restructure avoids the negative publicity and loss of goodwill associated with external administration
- As soon as a restructuring support agreement is reached proposing a creditors' scheme, court orders can be sought to impose a moratorium restraining any civil action against the company during the scheme implementation process
- Actual or potential class action shareholder claims may be extinguished - 'subordinate claims' including shareholder creditor claims under possible class actions
- Claims of secured creditors can be compromised whether or not they voted in favour of the scheme
- Effective releases can be given by creditors and possibly third parties
- Achievable with less than 100% agreement of creditors - creditors' schemes bind all scheme creditors including dissenting scheme creditors
- Meetings can be held on a consolidated basis as opposed to one for every class of creditor (when over 30 wholly owned subsidiaries are involved or otherwise, when the court provides its approval)
- Directors remain in control of the company and the company can continue to trade throughout the creditors' scheme process on a normal going concern basis
- Contractual terms requiring unanimous agreement may be superseded by lower approval thresholds in a creditors' scheme

1 'Standstill' or 'moratorium' schemes

It is possible to use a creditors' scheme as an interim restructuring step to allow more time to implement a more comprehensive restructuring in the future.

For example, a creditors' scheme may extend out the maturity date under a multi-party loan facility, if holders of at least 75% of the face value of the debt and a majority in number of debt holders agree.

The primary purpose of these creditors' schemes is to effect a rescheduling of a company's debts beyond their existing maturities to enable the company to satisfy repay or refinance those debts over a longer and more manageable period of time.

Metinvest scheme: Timeline of key events

Key dates	Brief summary
13 January 2016	■ The proposed creditors' scheme imposed a moratorium on enforcement action by noteholders. 'The Scheme merely imposes a moratorium against enforcement action by noteholders providing an opportunity, a breathing space, for negotiation of a restructuring of its financial indebtedness under the Notes'. ■ Some holders of 2016 notes objected to the creditors' scheme arguing that the 2016 notes were in a different class from the others, making a single meeting inappropriate; and the English court lacked jurisdiction. The objecting noteholders held in aggregate 11.175% of the 2016 notes, equivalent to less than 1% of the scheme debts. ■ The court creditors' held that the scheme creditors should form one class and that the English court did have jurisdiction.
29 January 2016	■ At the meeting, 220 noteholders attended, over 80% of the existing notes by value and interests aggregated to around US$913 million. A majority was also obtained in relation to each series of the notes. ■ The standstill scheme was to last until 27 May 2016. Shortly before that date, non-binding heads of terms for a restructuring of liabilities were agreed.
8 June 2016	■ In a later application, the company made an application for an order convening a creditors' meeting for a new creditors' scheme which would in effect serve as an extension of the moratorium under the earlier scheme. ■ It was proposed that the moratorium should last until 30 September 2016, subject to the possibility of both an extension up to 30 November 2016 and an earlier termination in certain circumstances. ■ The court ordered a creditors' meeting covering all note holders (as opposed to separate meetings).
30 June 2016	■ The meeting had been held on 28 June 2016. The second moratorium scheme was approved by 100% both by number and value of the scheme creditors voting at the meeting either in person or by proxy. Further, those voting represented approximately 85% by value of those entitled to vote. ■ It was acknowledged that this second creditors' scheme was very similar to the first creditors' scheme. The judge stated, 'I would observe that the court has already sanctioned one moratorium, This is simply a further extension of that moratorium in effect'.
24 January 2017	■ A new creditors' scheme of was proposed which had the effect of postponing liabilities to a future date. It was proposed to postpone payment by substituting new liabilities under which the principal due would be the outstanding capital and interest under each of the facilities and the new liabilities would fall due in a few years' time.
8 February 2017	■ The court sanctioned the new creditors' scheme. ■ Virtually 100% of the pre-export finance facility holders turned up at the meeting and 100% voted in favour of the creditors' scheme. While for the noteholders, turnout was in the high 90s (%) and voting in favour of the scheme was at least 90%.

UK case example: Metinvest BV

A company, incorporated and domiciled in the Netherlands, was the holding company and finance company within a mining and steel group.

The company had liabilities under notes it had issued, which matured at the end of January 2016, in 2017 or in 2018.

The group's assets were primarily located in eastern Ukraine and were consequently affected by the war and political instability in the region. The company was likely in default on the 2016 notes (falling due on 31 January 2016), which would trigger a cross-default under the other notes.

The court approved the creditors' scheme despite objections from holders of 11.18% of the 2016 notes, which "merely imposes a moratorium on enforcement".

The case also shows why characterising the creditor classes can be critical. The objecting 2016 noteholders argued they should be treated as a separate class of noteholder, and not included in one class along with all the other noteholders, which may have allowed them to block the creditors' scheme. The court rejected this argument, and the creditors' scheme was approved by the required noteholder majority.

Although not a statutory pre-requisite, in determining whether to approve a 'standstill' scheme, the courts have generally considered whether the extension of the maturity dates under the proposed creditors' scheme would enable the company to reach a better outcome than if it were subject to liquidation or winding up.

In the UK case of Re Apcoa Parking Holdings GmbH, the Court stated that:

> "...each of these schemes is of limited scope, devoted only to dealing with the imminent threat to the companies concerned, constituted by the fact that a termination date in respect of the facilities on which the group relies is fast approaching... if an extension is not sanctioned, the board of the ultimate parent company (which is incorporated in Germany) would be required to file German insolvency proceedings along the line. All this would be ultimately destructive of value when compared to what might be achieved by a consensual reconstruction, or some other form of reconstruction, if time is available for that purpose by an extension of the termination date."

Australian courts have also recognised that creditors' schemes may be implemented as moratoriums.

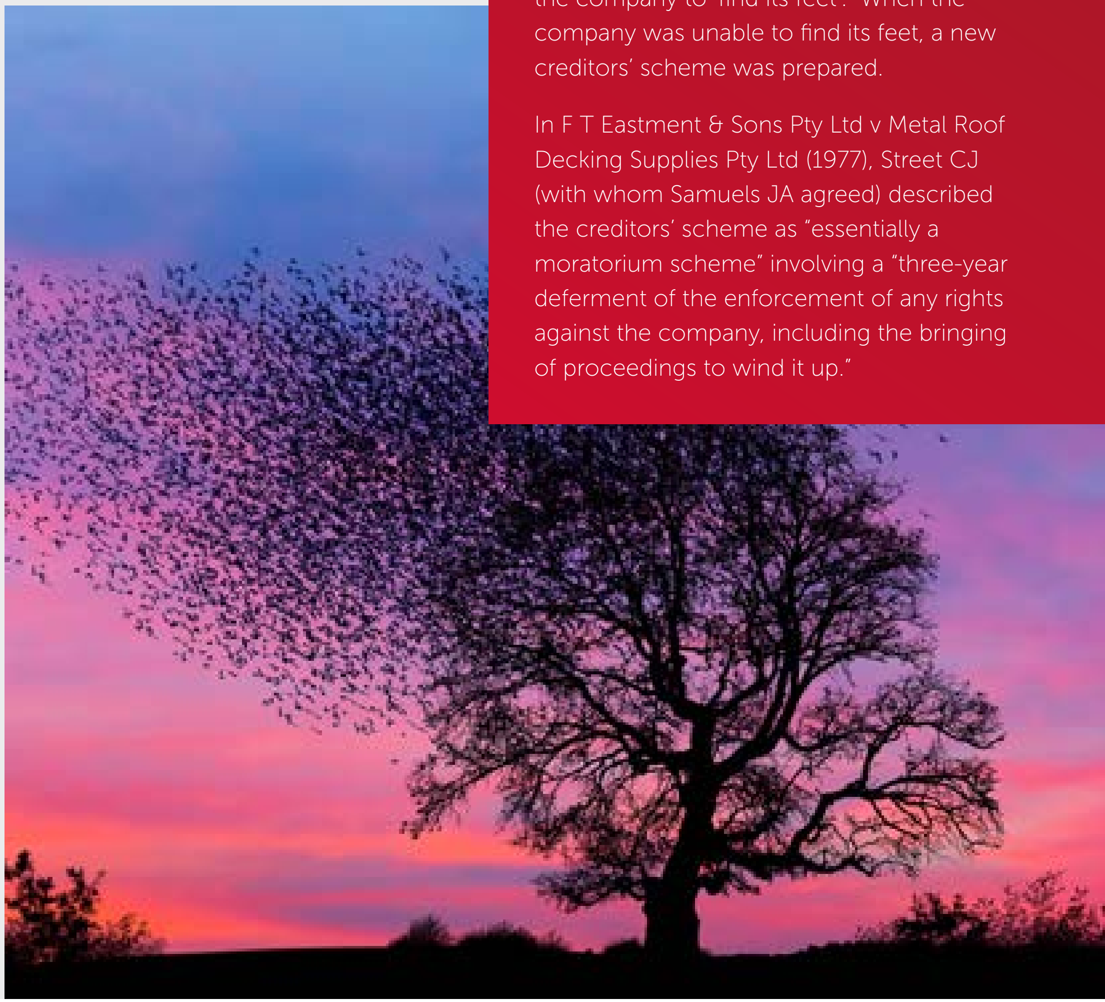
2 Amend-and-extend schemes – reducing approval thresholds

The use of a creditors' scheme as a moratorium (where holders of at least 75% of the face value of the debt approve the scheme), may even be possible where the terms of the underlying facility agreement or loan documents require a higher voting threshold (such as 80% or 100%) for creditors to agree to an extension of the maturity date.

In the 2018 restructuring of the BIS Industries Group, the NSW Supreme Court approved a scheme which effected an amendment to the consent threshold under the senior finance documents to allow the next stage of the recapitalisation to occur with only 80% senior creditors' consent, as opposed to the 100% of senior creditors' consent which would have been required but for the creditors' scheme.

However, in this case, the amendments were part of a broader restructuring which the creditors' scheme would facilitate, and the creditors' scheme was not proposed solely to amend the consent threshold.

See: In the matter of BIS Finance Pty Limited; In the matter of Artsonig Pty Limited [2017] NSWSC 1713; Re BIS Finance Pty Ltd [2018] NSWSC 3.



In National Bank of Australasia Ltd v Scottish Union and National Insurance Co (1952), a creditors' scheme was prepared for the purpose of securing a moratorium to enable the company to 'find its feet'. When the company was unable to find its feet, a new creditors' scheme was prepared.

In F T Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd (1977), Street CJ (with whom Samuels JA agreed) described the creditors' scheme as "essentially a moratorium scheme" involving a "three-year deferment of the enforcement of any rights against the company, including the bringing of proceedings to wind it up."

Case study – Thomas Cook Group plc

A good example of a case where creditors' schemes were used to lower approval thresholds to facilitate a restructure is the UK case of tour operator, Thomas Cook.

In the 12 months leading up to August 2019, Thomas Cook found itself experiencing significant financial difficulty which it attributed to a major economic slowdown in the travel industry. These difficulties saw the shares of Thomas Cook Group plc, the parent company, decrease by over 90%.

The creditors' schemes implemented were part of a broader restructuring process through which Thomas Cook Group plc sought to obtain new capital. It was expected that:

- Fosun Tourism Group, would inject £450 million of new capital in exchange for increasing its equity interest to at least 75% of the group, in addition to a 25% interest in its airline business; and
- Thomas Cook Group plc's core lending banks and noteholders would provide another £450 million of new money, while converting their existing debt into around 75% of the equity of the airline business and up to 25% of the equity in the tour operator business.

However, the transactions that were contemplated by the broader restructuring would not be effected by the creditors' schemes themselves. Rather, the objective of the creditors' schemes was to facilitate the implementation of the transactions by lowering the thresholds of creditor consent required to affect them.

Otherwise, amending the terms of the revolving credit facility (as was necessary to implement the transactions) required unanimous consent from all the relevant creditors, while releasing the claims of the relevant noteholders required the consent of 90% of them.

Through the implementation of the creditors' schemes, the consent threshold for the cash component of the revolving credit facility would be reduced to 75%, while the approval threshold in respect of the notes would decrease from 90% to 75% by value, with a quorum of 50.1%.

Liabilities subject to the schemes
€750 million 6.25% June 2022 unsecured notes issued by Thomas Cook Group plc
€400 million 3.88% July 2023 unsecured notes issued by Thomas Cook Finance 2
£650 million fully drawn, arranged by facility agent Lloyds Bank
£200m and €28 million worth of bonding facilities (comprising performance bonds and letters of credit), of which £211 million had been utilised

The UK courts have recognised the flexibility of creditors' schemes to amend consent thresholds.

Re NEF Telecom Co BV [2012]:

"

...that clause 41.2.7 requires the consent of all the lenders, and the scheme cuts across that provision. As it seems to me, **that is the very nature of the scheme. The whole purpose of the legislation in Part 26 of the Companies Act 2006 is to be able to require all lenders to be bound by a scheme of arrangement which would not otherwise be possible.'**

"

Over the years, these schemes have proved extremely effective as a commercial tool and have been extremely useful in saving companies that would otherwise have failed. In these circumstances, it seems to me quite inappropriate to raise an objection to the sanctioning of the schemes the fact that under the contractual documentation the changes proposed could not be achieved. That much is in real terms obvious. The benefit of the legislation is huge and if consent could not be compelled, there would be no purpose in the legislation at all."

Apcoa Parking Holdings GmbH & Ors [2014]:

"

The second point with which I was also concerned was lest the adoption of English law and jurisdiction and the promulgation of a scheme under the Companies Act 2006 might be said unfairly to deprive creditors of an essential part of their bargain: that is, that the termination date should not be altered except by unanimous consent. But, as it seems to me, the provision for change of law qualified that bargain, enabling it to be glossed by provisions of the newly adopted law, provided that the change of law and jurisdiction was properly explained and valid and effective under the original law. Again, I am comforted in my conclusion that the provision for unanimous consent does not preclude altering the termination dates by dint of a scheme by the facts that (a) no creditor has sought to contend to the contrary, whether on the ground of unfairness or otherwise, and (b) the experts consider that the changes would be effective under the original governing law."

Amend-and-extend schemes: Extending existing facilities and resetting loan covenants

The UK case of Cortefiel SA, a leading Spanish high street clothing retailer, the debtor refinanced its then existing facilities with an English law governed €1.4 billion facility.

It became clear in early 2012, when Cortefiel was experiencing financial difficulty, that if it failed to refinance the facility, it would breach its covenants and be unable to repay the loan at maturity.

Cortefiel proposed to its existing lenders to use the structural adjustment provisions in the loan documents to implement an extension to its revolving credit facility and reset its financial covenants to a more viable level.

The majority of the lenders supported the proposal, but Cortefiel did not receive the individual consent of each lender as was required.

Therefore Cortefiel proposed 'amend-and-extend' creditors' schemes.

Under the proposed creditors' schemes, one of the term loans and revolving facility were to be extended by three years, covenants to be reset with 17.5% headroom, and there would be a 2% margin uplift on the term loans.

Cortefiel argued that the senior lenders generally had largely similar rights and constituted one class. Nonetheless, the lenders of one tranche would receive an additional €15 million prepayment under the creditors' scheme, and so they were placed in a different class.

The Court was satisfied that the 'amend-and-extend proposal' constituted a fair compromise arrangement with the lenders.

This case is an example of the use of a creditors' scheme to amend and extend existing facilities and reset loan covenants.

‘Amend-and-extend’ schemes: 2 Australian examples

Wiggins Island Coal Export Terminal Pty Ltd

WICET, operating the Wiggins Island Coal Export Terminal in Gladstone, Queensland, was financed by a syndicate of 22 financiers.

By 29 March 2019, WICET found itself owing US$3,278 million to senior financiers under a syndicated facility, junior financiers and the holding company.

The restructure required WICET to seek Court approval for refinancing through a creditors’ scheme to bind all senior financiers (as a result of them being unable to form a unanimous agreement in respect of the terms of an extension). The creditors’ scheme proposed would facilitate a restructure of the senior debt.

To facilitate the broader restructuring, the creditors’ scheme involved an extension of the maturity date from 30 September 2018 to 30 September 2026, amendments to the terms of the amortisation, and other aspects of the financing.

See: Re Wiggins Island Coal Export Terminal Pty Ltd [2018] NSWSC 1342; Re Wiggins Island Coal Export Terminal Pty Ltd [2018] NSWSC 1434; Re Wiggins Island Coal Export Terminal Pty Ltd [2019] NSWSC 831

Wollongong Coal and Jindal Steel and Power

This transaction involved the debt restructuring of certain loan facilities through creditors' schemes of arrangement.

Before their implementation, the creditors' schemes had automatically been terminated, as certain payments which were a condition precedent had not been made by the relevant date.

The parties sought to re-enliven the creditors' schemes by applying for a court order to retrospectively amend the scheme terms to extend the due dates for the payments.

The case has confirmed that courts may retrospectively amend payment due dates and other timing requirements under a creditors' scheme of arrangement after it has been approved (and even after it has been terminated).

See: Re Wollongong Coal Limited and Jindal Steel & Coal Australia Pty Ltd [2020] NSWSC 73; Re Wollongong Coal Ltd; Jindal Steel & Power (Australia) Pty Ltd [2020] NSWSC 614

Creditors' schemes of arrangement: 7 key takeaways

1. **A flexible restructuring tool:** Creditors' schemes of arrangement are highly versatile and can be tailored to support recapitalisation or corporate debt restructuring – often without the need for external administration processes;
2. **Effective for large and complex turnarounds:** Creditors' schemeschemes have been successfully used to stabilise and even revive large, financially distressed companies, frequently through debt-for-equity swaps;
3. **Strategic breathing room:** Creditors' schemes have served as a valuable mechanism to pause enforcement rights, lower approval thresholds for future restructurings, extend loan maturities, and reset covenants – giving companies critical time to reorganise;
4. **Cross-border capability:** Creditors' schemes of arrangement can be used to restructure debt across jurisdictions, offering a coordinated solution for multinational businesses;
5. **Guarantor-initiated schemes:** It's not just the primary borrower – guarantor entities can also propose and implement creditors' schemes of arrangement;
6. **Court support where fairness is met:** Courts are generally supportive of proposed creditors' schemes, provided they are fair, reasonable, and receive approval from the required creditor majorities; and
7. **Facilitating, not just executing, restructuring:** A creditors' scheme doesn't need to complete a full restructuring on its own – it can serve as a standstill mechanism, giving a company time to develop and implement a broader restructuring plan or to extend payment timelines beyond original maturity dates.

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