
**CORPORATIONS AMENDMENT (CORPORATE INSOLVENCY REFORMS)
BILL 2020**

EXPOSURE DRAFT EXPLANATORY MATERIALS

Table of contents

Glossary.....	5
Overview and context for corporate insolvency reforms	6
Chapter 1 Debt restructuring	9
Chapter 2 Temporary relief for companies seeking a small business restructuring practitioner	39
Chapter 3 Simplified Liquidation.....	41
Chapter 4 Refinements to the registration of liquidators.....	61
Chapter 5 Virtual meetings and electronic communications	63

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ADI	Authorised deposit-taking institution
ASIC	Australian Securities and Investments Commission
Bill	Corporations (Corporate Insolvency Reforms) Amendment Bill 2020
Corporations Act	<i>Corporations Act 2001</i>
Corporations Regulations	<i>Corporations Regulations 2001</i>
the Determination	<i>Corporations (Coronavirus Economic Response) Determination (No.3) 2020</i>
ETA 1999	<i>Electronic Transactions Act 1999</i>
Insolvency Practice Rules	<i>Insolvency Practice Rules (Corporations) 2016</i>
Insolvency Practice Schedule	Schedule 2 to the <i>Corporations Act 2001</i>
Legislation Act	<i>Legislation Act 2003</i>

Overview and context for corporate insolvency reforms

Context for the reforms

The current insolvency system is a one-size-fits-all system that imposes the same duties and obligations, regardless of the size and complexity of the administration. In this way, the current system lacks the flexibility to provide for small businesses for which complex, lengthy and rigid procedures can be unsuitable. The barriers of high cost and lengthy processes can prevent distressed small businesses from engaging with the insolvency system early, reducing their opportunity to restructure and survive.

The costs incurred under external administration are borne out of the assets of the distressed company and can be greater than the value of the assets of the company. This places undue pressure on the company, potentially forcing it into liquidation at the end of voluntary administration, leaving less returns for creditors and employees.

These challenges are particularly evident in light of the economic consequences of Coronavirus and the increase in numbers of businesses facing financial distress. The significant economic consequences have highlighted the need for an efficient external administration process that allows small incorporated businesses to remain viable, and where that is not possible, for a process that encourages a better deal for creditors and employees.

To address these challenges, the Government has announced a package of reforms to the Australian insolvency framework. This package includes major changes to the framework for eligible small companies. This new framework is designed to meet the needs of small business and to support increased productivity and innovation by reducing the complexity and costs in insolvency processes. Further, the reforms are aimed at achieving greater economic dynamism, and ultimately helping more small businesses to survive.

Overview of the reforms

The Bill establishes a framework for the reform with more detail to be included in Corporations Regulations and Insolvency Practice Rules, including, for example, rules about the registration of small business restructuring practitioners.

The Bill covers some of the key aspects of the reform package. In particular:

- a formal debt restructuring process for eligible companies;
- extended temporary relief for eligible companies intending to undertake a formal debt restructuring process;
- a simplified liquidation process for eligible companies in a creditors' voluntary winding up;
- refinements to the requirements for registration as a liquidator; and
- the greater use of electronic documents and electronic signatures in an external administration;

The formal debt restructuring process allows an eligible company to restructure their debts and maximise their opportunity for survival. The formal debt restructuring process will allow a company director to retain control of their business, and its property and affairs, while developing a plan to restructure their debt with the assistance of a small business restructuring practitioner. More information can be found in Chapter 1.

[An eligible company waiting to access the debt restructuring process will be provided with a form of temporary relief from the statutory demand regime and relief from the directors' duty to prevent insolvent trading. The temporary relief amendments are not available as an exposure draft for consultation – see Chapter 2.]

The new, simplified liquidation process for eligible companies in a creditors' voluntary winding up is intended to provide a faster and lower cost liquidation, increasing returns for both creditors and employees. The simplified liquidation process preserves and applies most of the existing framework for liquidation in a creditors' voluntary winding up and adopts small changes for a more fit-for-purpose and efficient process. More information can be found in Chapter 3.

To support these reforms, there are amendments to the registration of insolvency practitioners. The amendments to the requirements for registration of a liquidator are intended to provide more flexibility to the registration process while maintaining high professional standards. More information can be found in Chapter 4.

The reforms also expand the situations where documents relating to the external administration of a company may be given electronically, and permit the electronic signing of documents relating to the external administration. More information can be found in Chapter 5.

The full policy context of the reform is set out in a fact sheet on the Department of the Treasury's website:
<https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-09/Insolvency-Reforms-fact-sheet.pdf>

Regulation impact on business

It is anticipated that the Government's proposed reform package as a whole will deliver significant regulatory savings for impacted businesses and individuals.

Regulatory impact analysis on the proposed reforms will be informed by consultation on this Bill, as well as consultation that will take place prior to the publication of the final Regulations and Rules.

This will ensure that the analysis accurately reflects the scope and impact of the reforms, as well as the views of stakeholders.

Chapter 1

Debt restructuring

Outline of chapter

1.1 Schedule 1 to the Bill inserts Part 5.3B in the Corporations Act to establish a new formal debt restructuring process for eligible small companies. This will enable financially distressed but viable firms to restructure their existing debts so that they can continue to trade.

Summary of new law

1.2 Schedule 1 inserts new Part 5.3B into the Corporations Act to establish a new formal debt restructuring process for eligible companies. This will enable financially distressed but viable firms to restructure their existing debts.

1.3 The intention of the debt restructuring process is to provide an alternative to the ‘one-size-fits-all’ voluntary administration regime for small non-complex businesses. It reduces the complexity and cost of the administration process, providing a greater role for the company directors during the process and allowing them to retain control over the company throughout. These changes are intended to encourage more small businesses to seek debt restructuring earlier, increasing their chances of recovering viability.

1.4 The ultimate aim of restructuring is to have a plan in place for the company to repay its existing debts, thereby enabling the company to stay in business and avoid being wound up. The restructuring process covers the period during which a plan is being developed by the business owners, following the appointment of a small business restructuring practitioner. The restructuring process may also be referred to as the period where the company is ‘under restructuring’ or ‘during restructuring’. The restructuring process ends once the plan is in place.

1.5 Schedule 1 provides the requirements for accessing the debt restructuring process, including the criteria that must be met. Only the board of company directors can choose to enter the company in the debt restructuring process. Creditors and other third parties cannot commence the process or force the company to enter the process. To enter the debt restructuring process a company must be insolvent, or likely to become insolvent, with total liabilities lower than the amount to be prescribed in the Corporations Regulations.

1.6 Safeguards apply to protect against illegal phoenixing activity or other forms of corporate misconduct. A company is not eligible to use the debt restructuring process if a director of the company has previously used this process or the simplified liquidation process (described in Chapter 3). The regulations may prescribe circumstances in which a director is exempt from the requirement that they have not previously used either the debt restructuring or simplified liquidation process. Regulations may also prescribe additional safeguards which would have to be met before a plan can be put to creditors. For example, regulations could require the business to ensure that payments to employees and tax lodgements are up to date before the plan could be put to creditors.

1.7 The new debt restructuring process draws heavily on the established voluntary administration framework in Part 5.3A of the Corporations Act and shares many of its features. For example, secured creditors' rights under the debt restructuring process are consistent with existing voluntary administration processes. The moratorium that will apply on a third parties' ability to enforce rights against the company is also consistent with the moratorium employed during voluntary administration.

1.8 At the end of the restructuring process, creditors vote to accept or reject the plan. To ensure this process is fair, related entities are unable to vote on the plan. No creditor meetings are required during the debt restructuring process, with voting on the plan occurring electronically or via technology. If the plan is rejected, the restructuring process ends, and the company can seek to use an alternative formal insolvency process (such as liquidation or voluntary administration).

1.9 Much of the detailed requirements relating to plans will be prescribed in regulations, including some features of the Corporate Insolvency Reforms announced by the Government on 24 September 2020. For example, once the plan is accepted and made, creditors whose debts are included in the plan would be bound by that plan in respect to those debts.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The company may, by resolution of its directors, enter the debt restructuring process if it meets the eligibility criteria.	No equivalent.

<i>New law</i>	<i>Current law</i>
A liquidator (or provisional liquidator) or secured creditor cannot enter the company into the debt restructuring process.	A liquidator or secured creditors can place the company under administration.
While a company is under the restructuring process, the company directors retain control of the company's business, property and affairs. However, the company directors must seek the consent of the small business restructuring practitioner for actions outside the ordinary course of business.	The administrator takes over the control of the company during voluntary administration.
Safe harbour protections – a company director is exempt from certain insolvent trading rules in relation to transactions within the ordinary course of business, or with consent of the small business restructuring practitioner, while a company is under restructuring.	Safe harbour protections – a company director is exempt from certain insolvent trading rules if the actions and/or transactions are reasonably likely to lead to a better outcome for the company and an administrator or liquidator is subsequently appointed.
The small business restructuring practitioner facilitates and assists the company directors to develop a debt restructuring plan.	No equivalent.
Only the company directors can propose a debt restructuring plan to the company's creditors.	A deed of company arrangement can be proposed by the company, company members, the administrator or creditors.
The restructuring plan can only deal with debts incurred by the company prior to entering debt restructuring.	A deed of company arrangement can deal with any aspect of company restructure.
The regulations may provide for certain requirements in relation to a restructuring plan.	No equivalent
Creditors vote on the plan via technology neutral methods without the need for physical meetings.	Under the existing voluntary administration process, creditors must be physically present or appoint a proxy to vote at meetings.
The small business restructuring practitioner administers the restructuring plan in accordance with the terms of the plan.	The administrator administers the deed of company arrangement in accordance with the terms of the deed.

<i>New law</i>	<i>Current law</i>
The small business restructuring practitioner may end the debt restructuring process when certain circumstances occur.	No equivalent
If the debt restructuring process or plan is terminated, existing insolvency processes can be used by the company and/or third parties.	Termination of voluntary administration or deed of company arrangement may result in the company being deemed to have passed a special resolution to be voluntarily wound up.

Detailed explanation of new law

Debt restructuring process

1.10 The voluntary administration process outlined in Part 5.3A of the Corporations Act (in conjunction with the Insolvency Practice Schedule of the Corporations Act, Chapter 5 of the Corporations Regulations and the Insolvency Practice Rules) provides a means for financially distressed companies to seek an arrangement with creditors to enable the company to survive. Under voluntary administration, an independent registered liquidator (the administrator) takes control of the company's business. The administrator investigates the company's activities and directors before providing their opinion to creditors on whether:

- the administration should end and control be returned to the company directors;
- the company should execute a deed of company arrangement (or DOCA); or
- the company should be wound up.

1.11 The creditors then vote to pass a resolution to decide what action the company will take.

1.12 The new debt restructuring process established in new Part 5.3B of the Corporations Act draws heavily on the established voluntary administration framework, as well as the debt agreements framework in Part IX of the Bankruptcy Act.

1.13 The object of the new Part 5.3B and the corresponding amendments to the Insolvency Practice Schedule is to provide for a restructuring process for eligible companies that allows the companies to:

- retain control of the business, property and affairs while developing a plan to restructure their debt with the assistance of a small business restructuring practitioner; and
- enter into a restructuring plan with creditors.

[Schedule 1, item 1, 452A of the Corporations Act]

Restructuring

Entering the debt restructuring process

1.14 A debt restructuring process begins with the appointment of a small business restructuring practitioner. *[Schedule 1, item 1, section 453A(a) of the Corporations Act]*

1.15 This appointment is made in writing by the company entering into the debt restructuring process. The company may appoint a small business restructuring practitioner if:

- the eligibility criteria are met; and
- the board of the company has resolved that:
 - the directors have reasonable grounds for suspecting that the company is insolvent, or is likely to become insolvent at some future time; and
 - a small business restructuring practitioner should be appointed.

[Schedule 1, item 1, section 453B(1) of the Corporations Act]

1.16 The eligibility criteria are described below.

1.17 The debt restructuring process is not available to a company if it is already under restructuring or administration, has executed a deed of company arrangement that has not yet terminated, or where a liquidator or provisional liquidator has been appointed to the company. This reflects the intention that the debt restructuring process is for companies that are experiencing financial difficulties but have not already commenced one of these external administration processes. *[Schedule 1, item 1, section 453B(2) of the Corporations Act]*

Eligibility criteria for entering the debt restructuring process

The liabilities test

1.18 The eligibility criteria requires that if the regulations prescribe criteria that must be satisfied in relation to the liabilities of the company

on the day that the small business restructuring practitioner is appointed, then those criteria must be satisfied. *[Schedule 1, item 1, section 453C(1) of the Corporations Act]*

1.19 The Corporations Regulations may provide, for example, the amount of the total liabilities of a company seeking to enter the debt restructuring process, and how these liabilities will be calculated.

1.20 The criteria to be prescribed in the regulations about the liabilities of the company will reflect the intention that the debt restructuring process is most appropriate for small businesses with non-complex liabilities.

1.21 Allowing the threshold amount to be prescribed in regulations is necessary to ensure that the debt restructuring process is available to companies whose liabilities are of a size for which this process is appropriate. This flexibility allows the simplified liquidation process to remain appropriate over time. *[Schedule 1, item 1, section 453C of the Corporations Act]*

1.22 A company seeking to enter a simplified liquidation process must also satisfy criteria to be prescribed in regulations regarding its liabilities. For simplicity, it is intended that the relevant criteria for the debt restructuring process and the simplified liquidation process are consistent to the extent that is appropriate. The eligibility criteria for entering the simplified liquidation process is described in Chapter 3. *[Schedule 1, item 1, section 453C(2) of the Corporations Act]*

No directors have previously used a debt restructuring process or a simplified liquidation process

1.23 The eligibility criteria requires that no director of the company has been a director of a company that has been the subject of a debt restructuring process or a simplified liquidation process during the period prescribed in the regulations. *[Schedule 1, item 1, section 453C(1) of the Corporations Act]*

1.24 This is an important safeguard for both processes and is targeted at preventing a pattern of behaviour from directors that could indicate illegal phoenixing activity or another form of corporate misconduct.

1.25 The regulations may prescribe circumstances in which a director is exempt from the requirement that they have previously used either the debt restructuring process or simplified liquidation process, and may also prescribe the period of time in which a previous use is relevant for the purposes of the rule. Allowing regulations to prescribe these matters is necessary to ensure that the rule is appropriately targeted and captures the sorts of behaviour that are intended to be excluded from the simplified processes. *[Schedule 1, item 1, section 453C(2) of the Corporations Act]*

1.26 The requirement that no director of the company has previously used a simplified process is consistent with the criteria for entry into the simplified liquidation process and is described in relation to those amendments in Chapter 3.

The small business restructuring practitioner

1.27 The small business restructuring practitioner provides advice to the company to ensure that it meets the requirements of the debt restructuring process. This includes assisting the company in the preparation of the restructuring plan, making a declaration to creditors in relation to the proposed plan in accordance with the regulations, and any other relevant functions provided for under the Act. *[Schedule 1, item 1, section 453E(1) of the Corporations Act]*

1.28 Additionally, the regulations may provide for and in relation to the functions, duties and powers of the small business restructuring practitioner for a company under restructuring. The regulations may also provide for the rights and liabilities of a current or former small business restructuring practitioner for a company under restructuring arising out of the performance of their functions and duties or the exercise of their powers in that capacity. *[Schedule 1, item 1, section 453E(2) of the Corporations Act]*

1.29 A person cannot be appointed as a small business restructuring practitioner for a company or for a restructuring plan unless the person has consented in writing to the appointment, and as of the time of their appointment, the person has not withdrawn their consent. *[Schedule 1, item 1, section 456A of the Corporations Act]*

1.30 *[The Insolvency Practice Rules enable new classes of registered liquidator to be established.]* Only a registered liquidator can consent to be appointed, and act as, a small business restructuring practitioner. Where a person is not a registered liquidator and they consent to an appointment – the person commits an offence of strict liability. In proceedings brought against the person, the person bears an evidential burden in proving that they were a registered liquidator. The penalty for the offence is 50 penalty units. *[Schedule 1, items 1 and 108, section 456B and the table in Schedule 3 to the Corporations Act]*

1.31 To ensure the independence of the small business restructuring practitioner, a person who is connected with a company must not seek or consent to be appointed as, or act as, the small business restructuring practitioner for that company. This rule does not apply if the Court gives leave to the person. A person is connected with a company and subject to this disqualification if the person:

- is indebted in an amount greater than \$5,000 to the company (unless the debt is owed in the specified circumstances described further below);

-
- has substantial holdings in a body corporate which is indebted in an amount greater than \$5,000 to the company (unless the debt is owed in the specified circumstances described further below);
 - is a creditor of the company or of a related body corporate in an amount exceeding \$5,000 (not including in the person's capacity as an administrator, liquidator, or small business restructuring practitioner for the company or a related company);
 - is a director, secretary, senior manager or employee of the company or of a body corporate that is a secured party in relation to property of the company;
 - an auditor of the company, or a partner or employee of the auditor; and
 - a partner, employer or employee of an officer (excluding a liquidator) of the company, or a partner or employee of an employee of an officer (excluding a liquidator) of the company.

[Schedule 1, item 1, section 456C(1) and (5) of the Corporations Act]

1.32 A person is taken to be a director, secretary, senior manager, employee or auditor of a company if the person has held one of those roles in the company or a related body corporate within the last two years, and ASIC has not directed otherwise. *[Schedule 1, item 1, section 456C(4) of the Corporations Act]*

1.33 A person is not disqualified if they are a creditor of the company for an amount in excess of \$5,000 due to a previous appointment as an administrator, small business restructuring practitioner or liquidator to the company or a related body corporate. *[Schedule 1, item 1, section 456C(1) of the Corporations Act]*

1.34 Certain debts do not disqualify a person from consenting to act as the small business restructuring practitioner for a company. If the company is an Australian authorised deposit-taking institution (ADI) or a body corporate registered under section 21 of the *Life Insurance Act 1995* and has made a loan to the person (in their capacity as a natural person) to purchase a private residential premises in the ordinary course of the company's business, that debt is to be disregarded. *[Schedule 1, item 1, section 456C(3) of the Corporations Act]*

1.35 Seeking or consenting to be appointed or acting as small business restructuring practitioner where a relationship exists with the company as per the above is an offence of strict liability. The penalty for the offence is 50 penalty units. *[Schedule 1, items 1 and 108, section 456C(2) and the table in Schedule 3 to the Corporations Act]*

1.36 To ensure transparency of the process, a small business restructuring practitioner is required to provide the company's creditors and ASIC with a declaration of relevant relationships when appointed. This information must be accurate, complete and kept up-to-date throughout the debt restructuring process. Any amendments to the declaration are to be provided to creditors and ASIC as soon as practicable. *[Schedule 1, item 1, section 453D of the Corporations Act]*

1.37 Offences apply in relation to failing to make, distribute and lodge a declaration (including a subsequent declaration following a change in circumstances). The penalty for the offence is 20 penalty units. A defence is available where the small business restructuring practitioner has reasonable grounds to believe that the matter does not need to be included in the declaration. *[Schedule 1, items 1 and 108, section 453D and the table in Schedule 3 to the Corporations Act]*

1.38 The small business restructuring practitioner is taken to be a company's agent when they perform a function or duty or exercise a power as the company's restructuring practitioner while the company is under debt restructuring. For example, the practitioner acts as an agent of the company where they sell company property to raise funds to pay debts or make an application to the Court on behalf of the company. *[Schedule 1, item 1, section 453H of the Corporations Act]*

1.39 Where more than one person is appointed as small business restructuring practitioner for a company or to administer a restructuring plan, the functions, duties and powers of the position may be performed or exercised by all small business restructuring practitioners equally or as provided for in the instrument of appointment as small business restructuring practitioners or under the restructuring plan. *[Schedule 1, item 1, sections 456J and 456K of the Corporations Act]*

Removal and replacement of a small business restructuring practitioner

1.40 The appointment of a small business restructuring practitioner for a company or a restructuring plan cannot be revoked. *[Schedule 1, item 1, section 456D of the Corporations Act]*

1.41 The company may appoint a different small business restructuring practitioner if the original restructuring practitioner dies, becomes prohibited from acting as small business restructuring practitioner for the company, or resigns. The appointment of the replacement practitioner is to be made by resolution of the company's board. *[Schedule 1, item 1, section 456E(1) to (3) of the Corporations Act]*

1.42 Alternatively, if the Court appointed the restructuring practitioner then the Court can also appoint a replacement practitioner. *[Schedule 1, item 1, section 456E(2) of the Corporations Act]*

1.43 Additionally, the Court may, on the application of ASIC, a company officer, member or creditor, appoint a small business

restructuring practitioner to a company that is under debt restructuring process if that company does not have an acting practitioner. *[Schedule 1, item 1, section 456E(4) of the Corporations Act]*

1.44 A replacement small business restructuring practitioner has the same obligation as the originally appointed small business restructuring practitioner to provide a declaration of relevant relationships to relevant creditors and ASIC as soon as practicable after appointment. The declaration must be accurate, complete and up-to-date. Failure to do so without reasonable grounds is an offence. The penalty for the offence is 20 penalty units. *[Schedule 1, items 1 and 108, section 456F and the table in Schedule 3 to the Corporations Act]*

Features of the debt restructuring process

Role of the small business restructuring practitioner

1.45 A payment made, a transaction entered into, or any other act or thing done in good faith by, or with the consent of, the small business restructuring practitioner of a company under restructuring is valid and effectual for the purposes of the Corporations Act and is not liable to be set aside in a winding up of the company. This applies in relation to payments, transactions and acts undertaken by the small business restructuring practitioner, a company under restructuring with the consent of the small business restructuring practitioner, or a company under restructuring in compliance with an order of the Court. The effect of this is to confirm the validity of certain acts done during the course of the restructuring. The intention of the provision is for it to be relied upon by a person who acquires property of the company during the restructuring. *[Schedule 1, item 1, section 453M of the Corporations Act]*

1.46 To ensure that the small business restructuring practitioner is not restricted in their ability to make a decision on any such application, the small business restructuring practitioner is protected against any action or proceeding arising out of the practitioner's decision to:

- terminate, or not to terminate, the restructuring of a company under section 453J; or
- give, or refuse to give, an approval or consent under Division 4 of new Part 5.3B.

[Schedule 1, item 1, section 456H of the Corporations Act]

Role of company directors and officers in debt restructuring process

Assisting the small business restructuring practitioner

1.47 The company directors retain control of the company's business, property and affairs during the debt restructuring process. The company directors are responsible for ensuring that they comply with the legislative

requirements of the debt restructuring process. *[Schedule 1, item 1, sections 453K and 453L of the Corporations Act]*

1.48 The preparation of the plan and supporting documentation is the responsibility of the company directors. Regulations prescribe the information, reports and documents that are to be given to the small business restructuring practitioner by the company. The regulations may also prescribe the type of information that needs to be provided and in what format it should be provided to third parties, such as ASIC and creditors, and the requirements for publishing relevant information.

1.49 The company directors are to help the small business restructuring practitioner by attending to them, providing information on the company's business, property, affairs and financial circumstances and giving the practitioner access to inspect and make copies of company books. Failure by the company to do so is an offence of strict liability without reasonable grounds. The regulation may provide for additional rights, obligations or liabilities owed to the small business restructuring practitioner by the company and its officers during the debt restructuring process and plan administration. *[Schedule 1, item 1, sections 453F and 456G of the Corporations Act]*

1.50 The small business restructuring practitioner also has the right to inspect company books held by persons outside the company. If the company fails to provide the small business restructuring practitioner with sufficient assistance and information, the practitioner may be unable to give an opinion on feasibility of a proposed plan in their declaration, which could affect how creditors vote on the plan. *[Schedule 1, item 1, section 453G of the Corporations Act]*

1.51 Regulations may prescribe what information is to be provided to the small business restructuring practitioner, ASIC or any other person during the debt restructuring process, including after the plan is made. It may also prescribe what information needs to be published and when this is to occur. A failure to provide information as prescribed in the regulations does not affect the validity of anything done or omitted under Part 5.3B unless otherwise ordered by the Court. *[Schedule 1, item 1, sections 457A and 457C of the Corporations Act]*

Running the company – ordinary course of business

1.52 Generally, while the company is under restructuring, directors must not enter into, or purport to enter into, a transaction or dealing affecting the property of the company. A director who fails to comply with this requirement commits an offence, the penalty for which is six months imprisonment. *[Schedule 1, items 1 and 108, section 453L(1) and the table in Schedule 3 to the Corporations Act]*

1.53 If a director is found guilty of such an offence, the Court may order that person to pay compensation to the company or to a person for loss or damage suffered because of the act or omission constituting the

offence. This order may be enforced as if it were a judgement of the Court. The Court has the power, under section 1318 of the Corporations Act, to relieve the person from the liability created by the order to pay compensation. *[Schedule 1, item 1, section 453LA of the Corporations Act]*

1.54 However, there are circumstances in which the prohibition against entering into, or purporting to enter into, transactions or dealings does not apply. The prohibition does not apply if:

- entering into the transaction or dealing was in the ordinary course of the company's business;
- the small business restructuring practitioner has consented to the transaction or dealing and, if any conditions are imposed on that consent, those conditions are met;
- the transaction or dealing was entered into under an order of the Court.

[Schedule 1, item 1, section 453L(2) of the Corporations Act]

1.55 In relation to the small business restructuring practitioner giving consent to a transaction, the practitioner may only give consent if the practitioner believes on reasonable grounds that it would be in the interests of the creditors to enter into the transaction or dealing. The practitioner may give consent subject to conditions. *[Schedule 1, item 1, section 453L(5) and (6) of the Corporations Act]*

1.56 The example below shows when a transaction is in the ordinary course of a company's business and when it is not.

Example 1.1: Consent for activity outside ordinary course of business

Nina's Refrigeration Supplies is under restructuring. Nina's company manufactures and sells refrigeration units. The sale of one or more refrigeration units is in the ordinary course of business for this company. The prohibition against entering into transactions in section 453L does not apply to the sale of refrigeration units.

Toni's Corner Café is also under restructuring. Toni wants to sell a refrigeration unit that is owned by the café and is no longer needed for the business, to be able to pay company debts. The sale of refrigeration units is outside the ordinary course of business for the café. Toni might seek the consent of the small business restructuring practitioner to sell this item. If the practitioner doesn't give consent, and if none of the other exceptions applies, the prohibition against entering into transactions in section 453L applies.

1.57 Further, the prohibition does not apply to a payment made:

- by an Australian ADI out of an account kept by the company with the ADI;

-
- in good faith and in the ordinary course of the ADI’s banking business; and
 - after the restructuring began and on or before the day on which (whichever happens first):
 - the small business restructuring practitioner gives to the ADI written notice of the appointment that began the restructuring; or
 - publishes a notice of the appointment that began the restructuring in accordance with the regulations.

[Schedule 1, item 1, section 453L(3) of the Corporations Act]

1.58 Generally, a transaction that is in contravention of the prohibition is void. However, the transaction will not be void if otherwise ordered by the Court. *[Schedule 1, item 1, section 453L(4) of the Corporations Act]*

1.59 Further, a payment made, a transaction entered into, or any other act or thing done in good faith by, or with the consent of, the small business restructuring practitioner of a company under restructuring is valid and effectual for the purposes of the Corporations Act and is not liable to be set aside in a winding up of the company. This applies in relation to payments, transactions and acts undertaken by the small business restructuring practitioner, by a company under restructuring with the consent of the small business restructuring practitioner, or by a company under restructuring in compliance with an order of the Court. The effect of this is to confirm the validity of certain acts done during the course of the restructuring. The intention of the provision is for it to be relied upon by a person who acquires property of the company during the restructuring. *[Schedule 1, item 1, section 453M of the Corporations Act]*

1.60 Entering the debt restructuring process is not to trigger liability of directors or relatives for guarantees of the company’s liability. Creditors are prevented from enforcing the guarantee or commencing proceedings, without leave of the Court. A **guarantee** includes a relevant agreement, as defined in section 9 of the Corporations Act, where a person or relative incurs liability in respect to a company liability. A **liability** includes a debt, liability or other obligation.

1.61 This is in addition to and does not limit the Court’s ability to make orders under section 1323 of the Corporations Act. The action for a guarantee in the debt restructuring process is as if under a civil proceeding and the creditor is the only aggrieved person. *[Schedule 1, item 1, section 453V of the Corporations Act]*

Effect of debt restructuring process on the company

1.62 When a company enters the debt restructuring process it must give notice on all public documents and negotiable instruments that it is under

the restructuring process by adding (“restructuring practitioner appointed”) after the company’s name. This requirement exists for the duration of the restructuring process. Failure to give this notice is an offence of strict liability attracting a penalty of 20 penalty units.

[Schedule 1, item 1, section 457B and the table in Schedule 3 to the Corporations Act]

1.63 Activities that alter the ownership control of the company, such as transferring or altering the status of shares, when the company is under debt restructuring, are void unless written consent from the small business restructuring practitioner for these changes is provided.

1.64 The small business restructuring practitioner must only give consent to a transfer of shares or an alternation in the status of members if the practitioner believes on reasonable grounds that the transfer or alteration is in the best interests of the company’s creditors as a whole. The consent must be unconditional or if conditional then these conditions must be satisfied. Where conditions are imposed, the Court may order that any or all of the conditions are set aside. The Court can give an order to set aside a condition if satisfied that the condition is not in the best interests of the company’s creditors as a whole.

1.65 The Court may also make an order to authorise a transfer of shares or an alternation in the status of members. The Court must be satisfied that the transfer or alteration is in the best interests of the company’s creditors as a whole.

1.66 In relation to an alternation in the status of members, the small business restructuring practitioner or the Court, as the case may be, must not consent to an alteration or order alteration if the alteration would contravene class rights covered in Part 2F.2 of the Corporations Act.

1.67 An alteration to share status that is made because of a determination by APRA, for the purposes of conversion and write-off, is not void (see Subdivision B of Division 1A of Part II of the *Banking Act 1959*, Division 2 of Part IIIA of the *Insurance Act 1973* and Division 1A of Part 10A of the *Life Insurance Act 1995*).

1.68 In relation to an alteration in the status of members, the practitioner must refuse to give consent if the alteration would contravene class rights covered in Part 2F.2 of the Corporations Act. The Court may make an order to authorise an alteration, but is bound by the same conditions as the small business restructuring practitioner.

1.69 If the small business restructuring practitioner gives conditional consent or refuses to give consent to a transfer of shares, the transferor, transferee or creditors of the company can apply to the Court to set aside the conditions or authorise the transfer. The small business restructuring practitioner is entitled to be heard at the proceedings.

1.70 Where the practitioner has given conditional consent or refused to consent to an alteration in the status of members, the members and the company creditors can apply to the Court to have the conditions set aside or authorise the alteration to member status. The small business restructuring practitioner is entitled to be heard at such proceedings.

[Schedule 1, item 1, section 453N of the Corporations Act]

1.71 The Court is to adjourn applications to wind up the company once a company enters the debt restructuring process and a provisional liquidators should not be appointed during this period. The application will not be adjourned if the Court is satisfied that it is in the best interests of the company creditors for the company to be wound up or a provisional liquidators appointed. The application remains as a *lis pendens* over the company and may effect purchases or mortgages of the company.

[Schedule 1, item 1, section 453P and 453U of the Corporations Act]

Effect of debt restructuring process on third party property rights

1.72 As a general rule, property rights cannot be exercised by third parties in relation to property of the company or property used, occupied by or in the possession of the company during the debt restructuring process. These restrictions do not apply where the small business restructuring practitioner has consented or leave is granted by the Court to exercise such a right. These restrictions also do not apply in relation to secured creditor rights as specified in Schedule 1. In this Schedule **property** includes any PPSA retention of title property of the company.

[Schedule 1, item 1, sections 453Q and 452B of the Corporations Act]

1.73 Court proceedings and enforcement processes are stayed and cannot be begun or proceed during the debt restructuring process, except with written consent from the small business restructuring practitioner or leave of the Court. The stay does not apply to prescribed or criminal proceedings. *[Schedule 1, item 1, sections 453R and 453S of the Corporations Act]*

Secured creditor rights are consistent with voluntary administration

1.74 During the debt restructuring process, the rights of secured parties, owners or lessors are consistent with those applying to the existing voluntary administration process under Division 7 of Part 5.3A of the Corporations Act. *[Schedule 1, item 1, Subdivision F of Division 2, sections 454A to 454M of the Corporations Act]*

1.75 If a company's property is subject to a possessory security interest, and the property is in the lawful possession of the secured party, the secured party can continue to possess the property during the restructuring of the company. However, the secured party in possession cannot sell or otherwise enforce the security interest over the property.

[Schedule 1, item 1, section 453Q (3) of the Corporations Act]

1.76 Property subject to a banker's lien is exempt from the restrictions which generally apply to third party property rights during debt restructuring. For the exemption to apply, the property must be subject to a possessory security interest by an ADI or the operator of a clearing and settlement facility (within the meaning of section 768A of the Corporations Act). Property that may be exempt consists of:

- cash;
- negotiable instruments;
- securities; or
- derivatives.

[Schedule 1, item 1, section 453W of the Corporations Act]

1.77 A security interest over perishable property is exempt from the restrictions which generally apply to third party property rights during debt restructuring. The secured party, receiver or controller can recover and enforce security rights over perishable property. *[Schedule 1, item 1, sections 454E and 454L of the Corporations Act]*

1.78 A secured party with a security interest over the whole or substantially the whole of the company's property, either in one or multiple securities, can enforce their security interest if they act before or during the decision period. *[Schedule 1, item 1, section 454C of the Corporations Act]*

1.79 The **decision period** begins when the secured party receives notice of the debt restructuring process or when the restructuring process begins. The decision period ends thirteen business days from the day it begins. *[Schedule 1, item 3, section 9 of the Corporations Act]*

1.80 Where the enforcement of a security interest begins before the debt restructuring process begins, nothing in new Part 5.3B prevents the secured party, receiver or other person from enforcing that security interest. This applies if the secured party, receiver or other person had commenced enforcement action by:

- entering into possession or assuming control of the property;
- entering into an agreement to sell the property;
- making arrangements for the property to be offered for sale by public auction;
- publicly inviting tenders for the purchase of the property; or
- exercising any other power in relation to the property.

[Schedule 1, item 1, section 454D of the Corporations Act]

1.81 Certain provisions relating to recovery of property do not apply where the enforcement of a right, or the performance or exercise of a

function or power is authorised by a transaction or dealing that gives rise to a security interest in property. For example a transaction or dealing that is a commercial consignment of personal property giving rise to a PPSA security interest. *[Schedule 1, item 1, section 454J of Act being amended]*

1.82 Where a receiver or other person takes action to enforce the rights of the owner or lessor before the debt restructuring process begins, they are not prevented from performing a function or exercising a power in relation to the property. *[Schedule 1, item 1, section 454K of the Corporations Act]*

1.83 The functions and powers of a receiver or controller, appointed for the purposes of Part 5.2 of the Corporations Act, may only be performed or exercised during the debt restructuring process if:

- the party with a security interest acts before or during the decision period;
- the enforcement is under a security interest that begins before the debt restructuring process;
- the recovery of property on behalf of the owner or lessor begins before the debt restructuring process; or
- the recovery or enforcement of a security interest is in relation to perishable property. *[Schedule 1, item 1, section 453K(2) of the Corporations Act]*

1.84 The Court may limit the powers of a receiver or other person acting to enforce a security interest over the property of a company during restructuring. The Court may order a secured party, receiver or other person not to perform specified functions or exercise specified powers in relation to secured property, except as permitted by the order. The small business restructuring practitioner may apply to the Court for such an order. The Court may only make an order if satisfied that the secured party's interests are adequately protected during the restructuring process. An order will have effect even if the secured party begins enforcement or recovery of secured property before the company begins restructuring, or if the security interest relates to perishable property. However, this provision does not apply in relation to a security interest over the whole or substantially the whole of the company's property, where that security interest is enforced before or during the decision period. *[Schedule 1, item 1, section 454F of the Corporations Act]*

1.85 Similarly, the Court may limit the powers of a receiver or other person acting to enforce the rights of an owner or lessor in relation to property that is used or occupied by, or is in the possession of, the company. Following an application by the small business restructuring practitioner, the Court may order the person not to perform specified functions or exercise specified powers in relation to the property, except as permitted by the order. The Court may only make an order if satisfied that the interests of the owner or lessor will be adequately protected

during the restructuring process. An order will have effect even if the secured party begins enforcement or recovery of secured property before the company begins restructuring, or if the security interest relates to perishable property. The order is only effective during the restructuring process. *[Schedule 1, item 1, section 454M of the Corporations Act]*

1.86 If the company is under restructuring and a secured party with a possessory security interest is in possession of the relevant property and sells that property, the net proceeds of the sale may be retained by the secured party in some circumstances. Where there is no other security interest with an equal or higher priority, the secured party with the possessory security interest is entitled to retain the proceeds of the sale as follows:

- if the net proceeds is equal to or less than the debt secured, the secured party can retain the net proceeds; or
- if the net proceeds exceed the debt secured, then the secured party is entitled to retain so much of the net proceeds as equals the debt secured and must pay the excess to the small business restructuring practitioner on behalf of the company. *[Schedule 1, item 1, section 454H of the Corporations Act]*

1.87 A PPSA security interest is only enforceable if the security interest is perfected, within the meaning of the *Personal Property Securities Act 2009*, when the enforcement starts. *[Schedule 1, item 1, sections 454B of the Corporations Act]*

1.88 Section 453T outlines the duties of a court officer in relation to the property of a company, where they receive written notice that the company is under restructuring. A **court officer** is a sheriff, registrar or other appropriate officer of the court. *[Schedule 1, item 1, section 453T of the Corporations Act]*

1.89 The court officer cannot take action to sell company property under a process of execution. Any company property in the court officer's possession under a process of execution must be delivered to the small business restructuring practitioner.

1.90 In relation to funds obtained under a process of execution, the court officer is not to pay to any person (other than the small business restructuring practitioner) the proceeds from the sale of property, money of the company that is seized, or money paid to avoid seizure or sale of property. The court officer must pay to the small business restructuring practitioner all such proceeds or money in their possession or that have been paid to the court and have not since been paid out. The court officer may retain so much of the proceeds or money as they think is necessary to address charges relating to costs of execution.

1.91 The court officer is not to take action in relation to the attachment of a debt due to the company while it is under restructuring. Any money

received by the court officer because of the attachment of such debt, is to be paid to the small business restructuring practitioner.

1.92 However, the Court may permit a court officer to take action or make a payment to a third party that would otherwise not be permitted under section 453T, if it is satisfied that it is appropriate to do so.

1.93 A person who buys property in good faith under a process of execution gets good title to the property against the company and the small business restructuring practitioner.

Effect on enforcement rights triggered by debt restructuring process

1.94 A right that arises by express provision of a contract, agreement or arrangement for one of the following reasons cannot be enforced during the stay period for that reason:

- the company is under restructuring;
- the financial position of the company while under restructuring;
- a reason prescribed in the regulations, if the company later comes under restructuring; or
- a reason that, in substance, is contrary to this provision.

[Schedule 1, item 1, section 454P of the Corporations Act]

1.95 The ***stay period*** starts when the debt restructuring process begins and ends when:

- the restructuring ends; or
- if one or more orders are made as a result of applications before restructuring ends, then when the last order ceases to be in force; or
- if an extension is granted by the Court, then when that extension ends; or
- if the company ceases to be under restructuring because of a resolution or order for the company to be wound up, then when the company is fully wound up.

1.96 The Court may order the stay period be extended if the Court is satisfied it is in the interests of justice. Before deciding an application to extend the stay period, the Court may grant an interim order but the applicant must not to be required to give an undertaking as to damages as a condition of doing so. *[Schedule 1, item 1, section 454P of the Corporations Act]*

1.97 Provisions in new Part 5.3B relating to stays on enforcement, and powers of the Court in relation to stays, also apply to self-executing provisions in contracts, agreements or arrangements in the same way that

they apply to other rights. Self-executing provisions that are triggered by the company entering the restructuring process are stayed and cannot start to apply against the company unless leave of the Court is obtained. Regulations may prescribe modifications to the relevant provisions in new Part 5.3B as are necessary to ensure they apply appropriately to self-executing provisions. *[Schedule 1, item 1, section 454S of the Corporations Act]*

1.98 Rights that are created under a contract, agreement or arrangement entered into after the company begins restructuring are not stayed. Rights of a prescribed kind, or in a prescribed type of contract, agreement or arrangement, are not subject to the stay. The Minister may, through legislative instrument, declare the kinds of rights (either in general or in specific circumstances) or the kinds of contracts, agreements or arrangements referred to in a specified Commonwealth law that are not stayed. *[Schedule 1, item 1, section 454P of the Corporations Act]*

1.99 To the extent that a right arises in a contract, agreement or arrangement after the stay period ends because of the company's financial position during the stay period, the use of the restructuring process, or for a reason prescribed in the regulations, it is not enforceable against the company indefinitely. Unless the small business restructuring practitioner, administrator or liquidator of the company has consented in writing to the enforcement of such a right. *[Schedule 1, item 1, section 454P of the Corporations Act]*

1.100 A person who is or has been a small business restructuring practitioner for a company under restructuring is not liable to an action or other proceedings for damages in respect of a decision to give, or refuse consent to an entity to enforce rights in relation to the company's property. *[Schedule 1, item 1, section 456H of the Corporations Act]*

1.101 If an entity cannot enforce one or more rights against the company due to the stay period, a company cannot enforce a right for a new advance of money or credit from that entity during the same period. *[Schedule 1, item 1, section 454P(8) of the Corporations Act]*

1.102 The Court may order that a stay on the enforcement of rights does not apply for one or more rights if satisfied it is appropriate in the interests of justice. A rights holder may apply to the Court for such an order. *[Schedule 1, item 1, section 454Q of the Corporations Act]*

1.103 The Court may make an order that, for a specified period, rights are only enforceable with the leave of the Court and in accordance with such terms imposed by the Court (if any). The Court may make such an order if the rights are being or are likely to be exercised, or there is a threat to exercise the rights. The small business restructuring practitioner may apply to the Court for such an order. *[Schedule 1, item 1, section 454R of the Corporations Act]*

1.104 The Court's powers to make such orders do not apply where:

- the right is under a contract, agreement or arrangement entered into after the company begins restructuring;
- the right is of a kind, or contained in a kind of contract, agreement or arrangement, prescribed by the regulations or declared by the Minister for the purpose of this provision; or
- the small business restructuring practitioner, or an administrator or liquidator (if applicable), has consented to the enforcement of the right.

1.105 The Court may grant an interim order prior to deciding on an application by the small business restructuring practitioner on the enforcement of rights. The Court must not require the applicant for such an order to give an undertaking as to damages as a condition of granting an interim order. *[Schedule 1, item 1, section 454R of the Corporations Act]*

1.106 While the company is under debt restructuring, nothing prevents a person from giving a notice under the provisions of an agreement or instrument under which a security interest is created or arises. *[Schedule 1, item 1, section 454G of the Corporations Act]*

1.107 If there is any inconsistency between the stay period and self-executing provisions in new Part 5.3B and one of the following Acts, these Acts will prevail to the extent of the inconsistency.

- *Payment Systems and Netting Act 1998;*
- *International Interests in Mobile Equipment (Cape Town Convention) Act 2013. [Schedule 1, item 1, section 454T of the Corporations Act]*

1.108 The time for doing an act does not run while prevented by this Schedule. Where an act must or may be done before or within a particular time period, and it is prevented from doing so by this Schedule, the period of time to do the act is extended or deferred according to how long it is prevented by this Schedule. *[Schedule 1, item 1, section 458B of the Corporations Act]*

Terminating a debt restructuring process

1.109 The circumstances under which the debt restructuring of a company ends may be prescribed by the regulations. *[Schedule 1, item 1, section 453A(b) of the Corporations Act]*

1.110 The small business restructuring practitioner for a company under restructuring may terminate the debt restructuring process, at any time, if they believe on reasonable grounds that:

- the company does not meet the eligibility criteria for restructuring

-
- it would not be in creditors' interests to make a restructuring plan
 - it would be in the interests of creditors for the restructuring to end
 - it would be in the interests of creditors for the company to be wound up
 - any other grounds prescribed by the regulations.

[Schedule 1, item 1, section 453J(1) of the Corporations Act]

1.111 For the termination to have effect, the small business restructuring practitioner must give notice of the termination, in writing, and including all information prescribed in the regulations, to the company and as many of its creditors as reasonably practicable. *[Schedule 1, item 1, section 453J(2)-(3) of the Corporations Act]*

1.112 Termination takes effect on the day on which the notice is given by the small business restructuring practitioner to the company. *[Schedule 1, item 1, section 453J(4) of the Corporations Act]*

1.113 A person who is or has been a small business restructuring practitioner for a company under restructuring is not liable to an action or other proceedings for damages in respect of a decision to terminate, or not terminate, the restructuring of a company under new section 453J. *[Schedule 1, item 1, section 456H of the Corporations Act]*

Restructuring plan

Developing a restructuring plan

1.114 The regulations may provide for matters relevant to developing a restructuring plan.

1.115 Specifically, the regulations may provide for and in relation to:

- making a restructuring plan and the consequences of doing so; and
- varying a restructuring plan and the consequences of doing so.

[Schedule 1, item 1, section 455B(2) of the Corporations Act]

Proposing a restructuring plan to creditors

1.116 A company may propose a restructuring plan to its creditors. *[Schedule 1, item 1, section 455A(1) of the Corporations Act]*

1.117 A company is taken to be insolvent if it proposes a restructuring plan to its creditors. *[Schedule 1, item 1, section 455A(2) of the Corporations Act]*

1.118 The regulations may prescribe the time at which the company is taken to have proposed the plan for the purposes of determining when the company became insolvent. *[Schedule 1, item 1, section 455A(3) of the Corporations Act]*

1.119 The regulations may prescribe the requirements in relation to proposing a restructuring plan. *[Schedule 1, item 1, section 455B(1)(a) of the Corporations Act]*

1.120 This includes criteria which must be met before the company can put a plan to creditors. For example, consistent with the eligibility criteria for the simplified liquidation process (described in Chapter 3), the regulations may require that the company's tax lodgements are up to date before the company may propose a plan to its creditors. As another example, the regulations could also require the company to pay any employee entitlements which are due and payable before it can put a plan to its creditors.

1.121 The regulations may also prescribe the process by which creditors may accept and reject a proposal for a restructuring plan. *[Schedule 1, item 1, section 455B(1) of the Corporations Act]*

1.122 The regulations may also prescribe the circumstances in which a proposal for a restructuring plan lapses and the consequences of a plan lapsing. *[Schedule 1, item 1, section 455B(1) of the Corporations Act]*

Content of a restructuring plan

1.123 A restructuring plan will need to provide sufficient information so that creditors can decide whether to accept or reject the plan.

1.124 The regulations may make provision for the following information that may or must be included in a restructuring plan:

- The debts and claims that must or may be dealt with;
- The payment of those debts under a plan. This could include, for example, the quantum of payments to be made, and to whom they must be made; and
- The period within which those debts and claims must be paid under a restructuring plan.

[Schedule 1, item 1, section 455B(1) and (3) of the Corporations Act]

Terminating, contravening and voiding a restructuring plan

1.125 The regulations may provide for the circumstances in which a restructuring plan is terminated, contravened, or when all or part of a restructuring plan is void. Likewise, the regulations may provide for the consequences of these matters. *[Schedule 1, item 1, sections 455B(2), (5) and (6) of the Corporations Act]*

1.126 The regulations may confer powers on the Court in relation to the debt restructuring process and restructuring plan. They may prescribe whether those powers are to be exercised on the Court's initiative or by persons prescribed in the regulation. The powers conferred on the Court under the regulations are in addition to any other power conferred on the Court. The powers that are conferred on the Court include the power to vary or terminate a restructuring plan or to declare a plan void. *[Schedule 1, item 1, section 458A of the Corporations Act]*

Identifying contributories of a company entering restructuring

1.127 The regulations may make provision for identifying contributories of the company and their rights, obligations and liabilities in relation to a restructuring plan. *[Schedule 1, item 1, section 455B(4) of the Corporations Act]*

The small business restructuring practitioner

1.128 The regulations may provide for matters relevant to appointing a small business restructuring practitioner for a restructuring plan. Specifically, the regulations may provide for the practitioner's appointment, their functions, duties and powers for the restructuring plan, and their rights, obligations and liabilities of the small business restructuring practitioner arising out of the performance of their functions and duties and the exercise of their powers. *[Schedule 1, item 1, section 455B(7) of the Corporations Act]*

Miscellaneous

1.129 The regulations may also provide for the following in relation to a restructuring plan:

- How the value of debts and claims under a restructuring plan are to be calculated;
- The proof and ranking of those debts and claims under a restructuring plan;
- The company property that must or may be used in payment of debts to and claims against the company;
- How those debts and claims are to be treated if the company property is not sufficient to satisfy them in full;
- The nature and duration of any moratorium on the enforcement of debts and claims against a company under restructuring; and
- The effect of a restructuring plan on rights, obligations and liabilities in relation to debts of and claims against a company.

[Schedule 1, item 1, section 455B(3) of the Corporations Act]

Corporations Regulations

1.130 The Bill provides a range of regulation-making powers to provide flexibility and specificity for the debt restructuring process.

1.131 For entry into the debt restructuring process, the regulations may provide for:

- criteria that must be satisfied in relation to the liabilities of the company; and
- the period of time in which a director of a company must not have been through a simplified liquidation or debt restructuring process, and circumstances in which a director is exempt from this requirement.

1.132 For the debt restructuring process itself, the regulations may provide for:

- additional functions, duties, powers, rights and liabilities of a small business restructuring practitioner for a company under restructuring;
- the rights, obligations and liabilities of a company and its officers in relation to the small business restructuring practitioner;
- powers of the Court;
- stays on enforcing rights;
- circumstances in which the safe harbour provisions do not apply;
- indemnifying debts of the small business restructuring practitioner;
- giving information, reports or documents to the small business restructuring practitioner, ASIC or creditors; and
- publishing information, reports or documents.

1.133 For exiting the debt restructuring process, the regulations may prescribe:

- the circumstances in which the debt restructuring process ends;
- any other reasonable grounds that the small business restructuring practitioner may terminate the restructuring process; and
- the information to be included in a notice of termination.

1.134 Detailed requirements relating to debt restructuring plans will be prescribed in regulations (described in detail at paragraphs 1.114 to 1.129). In summary, the regulations may prescribe detailed requirements in relation to:

- proposing a restructuring plan;
- making, varying and terminating a restructuring plan;
- debts and claims in relation to a restructuring plan;
- contributories in relation to a restructuring plan;
- circumstances in which the restructuring plan is void;
- contravention of a restructuring plan;
- the small business restructuring practitioner for a restructuring plan;
- information, reports or other documents in relation to a restructuring plan; and
- powers of the Court in relation to a restructuring plan.

1.135 In the event that regulations made in relation to debt restructuring plans contain provisions which are inconsistent with the Corporations Act or any other Acts, the regulations will prevail to the extent of any inconsistency. This power is necessary to deal with potential situations where the operation of the Act may produce unintended or unforeseen results that are not consistent with the policy intention for the new regime. Issues may arise that were not contemplated at the time of drafting because the debt restructuring process is a new regime. Further, because this new regime has been developed in response to the significant and continuing economic consequences of the Coronavirus, there is greater than usual need for the Government to be empowered to deal with unintended or unforeseen consequences, particularly those that risk undesirable outcomes for companies and creditors. In this context, it is appropriate for the Government to be able to address these potential consequences where the issues are too specific to be dealt with adequately, and in a timely manner, in the primary law.

1.136 The range of regulation-making powers provides the Government with the appropriate and necessary flexibility to make timely changes to support small business restructuring practitioners and small business owners to engage in debt restructuring processes that are cost and time efficient. The economic uncertainty of the Coronavirus outbreak places particular pressure on small businesses, and providing specificity in regulations allows the process to respond quickly to developments that occur from the expected increase in the number of financially distressed businesses seeking to restructure debt. In this way, regulations are

appropriate to ensure that the debt restructuring process best reflects the needs of small businesses.

1.137 The regulations would be subject to disallowance, and therefore, subject to the appropriate parliamentary scrutiny.

Consequential amendments

1.138 The dictionary at section 9 of the Corporations Act is amended to insert new definitions, and amend existing definitions, to reflect the debt restructuring process. A note is added to the definition of insolvency in subsection 95A(2) of the Corporations Act, to clarify that where a company proposes a restructuring plan to creditors it is taken to be insolvent. *[Schedule 1, items 2-11 and 20, sections 9 and 95A of the Corporations Act]*

1.139 Additional items are added to the table in section 91 of the Corporations Act which sets out the meaning of relation back day in the Act to reflect the debt restructuring process. *[Schedule 1, item 18, section 91 of the Corporations Act]*

1.140 Section 513CA is inserted to provide that the *section 513CA day* in relation to the restructuring of a company is the day on which the restructuring of the company began. The term is used in a range of instances in the Corporations Act to identify the day on which the restructuring of the company began. *[Schedule 1, items 18, 42-45, 61, 75 and 76, sections 91, 513A, 513B, 513C, 513CA, 588FL, 596A and 597A of the Corporations Act]*

1.141 The small business guide in Part 1.5 is amended to provide guidance on when the debt restructuring process can be used and the potential consequences of such an action. *[Schedule 1, item 19, section 12.1A of the small business guide in Part 1.5 of the Corporations Act]*

1.142 Amendments to section 157A in the Corporations Act provide that the small business restructuring practitioner can apply to ASIC if a company wishes to change its name during the debt restructuring process or under a plan. The small business restructuring practitioner should only make such an application to ASIC if it is in the interests of the company creditors as a whole to do so. The company must continue to use its former name in all public documents and negotiable instruments, if the name change occurred in the six months before the debt restructuring process began. Leave of the Court may be sought to use the new name on such documents. *[Schedule 1, items 22-26, sections 157A and 161A of the Corporations Act]*

1.143 Section 601FH is amended to ensure that indemnity rights of the company under restructuring are consistent with those applying to companies under administration. *[Schedule 1, item 82, section 601FH of the Corporations Act]*

1.144 Safe harbour provisions are amended to ensure that certain director actions undertaken while the company under restructuring are not in breach of insolvent trading laws, consistent with those applying to companies under administration. *[Schedule 1, items 62-68, sections 588GAB, 588GAC, 588GAAA, 588GB and 588GH of the Corporations Act]*

1.145 Priority payments provisions are amended to ensure that debts and expenses of the small business restructuring practitioner are given the same priority as those of an administrator of a company under administration. The regulations will prescribe the debts (if any) for which the small business restructuring practitioner is entitled to be indemnified. *[Schedule 1, items 51-55, section 556 of the Corporations Act]*

1.146 Provisions relating to voidable transactions are amended to reflect that transactions undertaken by the company while the company is under restructuring or subject to a restructuring plan are voidable if the company is subsequently wound up, unless those transactions were made:

- in the ordinary course of business, or by or with the consent of the small business restructuring practitioner during the restructuring process; or
- on behalf of the company by or under the authority of the small business restructuring practitioner for the plan.

[Schedule 1, items 56-60, sections 588FE, 588FGB and 588FL of the Corporations Act]

1.147 *[Consequential amendments relating to takeovers (Chapter 6 of the Corporations Act) are under consideration.]*

1.148 Minor consequential amendments are made to insert references to the debt restructuring process and small business restructuring practitioner in the Corporations Act. *[Schedule 1, items 12-17, 21, 27-41, 46-50, 69-74, 77-81, 83-84, sections 53, 60, 109X, 198G, 206D, 250PAA, 250PAB, 283BG, 420, 422, 425, 438D, 448C, 468, 482, 533, 553, 589, 595, 596AB, 596AC, 600AA, 600F, 600H, 911A and 1317S of the Corporations Act]*

1.149 Subdivision DA is added to Division 60 of the Insolvency Practice Schedule to enable the Insolvency Practice Rules to provide for the remuneration of the small business restructuring practitioner. *[Schedule 1, item 93, Subdivision DA of Division 60 of Schedule 2 of the Corporations Act]*

1.150 Section 75-21 is added to the Insolvency Practice Schedule to reflect that the small business restructuring practitioner is not required to hold creditor meetings. However, creditor meetings may be held if the small business restructuring practitioner is satisfied that there are exceptional circumstances and it is in the interests of the creditors to do so. *[Schedule 1, item 99, section 75-21 of Schedule 2 of the Corporations Act]*

1.151 Minor consequential amendments to insert references to the debt restructuring process and small business restructuring practitioner are made to the Insolvency Practice Schedule. *[Schedule 1, items 85-92, 94-98,*

100-107, sections 1-5, 5-5, 5-15, 5-20, 60-1, 60-2, 70-5, 70-6, 70-10, 75-1, 80-1, 80-5, 90-1, 90-23 and 90-24 of Schedule 2 of the Corporations Act]

1.152 The table of penalties at Schedule 3 of the Corporations Act is amended to include the penalties for contraventions of the debt restructuring provisions as described in this Chapter. *[Schedule 1, item 108, Schedule 3 of the Corporations Act]*

Commencement provisions

1.153 Schedule 1 to the Bill will commence the day after the Act receives the Royal Assent. *[Section 2 of the Bill]*

Chapter 2

Temporary relief for companies seeking a small business restructuring practitioner

Outline of chapter

- 2.1 The temporary relief scheme was announced on 24 September 2020 as part of the Corporate Insolvency Reform package.
- 2.2 This Chapter is a placeholder the temporary relief amendments which are not available as an exposure draft for consultation.

Chapter 3

Simplified Liquidation

Outline of chapter

3.1 Schedule 3 to the Bill establishes a simplified liquidation process for the purpose of winding up the affairs and distributing the property of a company in a creditors' voluntary winding up. The Schedule inserts new rules that apply to elements of the liquidation process for liquidations that are eligible to adopt and have adopted the simplified liquidation process.

Summary of new law

3.2 Schedule 3 establishes a simplified liquidation process for the purpose of winding up the affairs and distributing the property of an eligible company in a creditors' voluntary winding up, as well as the requirements for entering and exiting the process.

3.3 The intention of the simplified liquidation process is to supplement the 'one-size-fits-all' liquidation regime with a regime that has appropriate pathways for less complex liquidations, in particular for incorporated small businesses. By reducing complexity, time and costs in the liquidation process, the simplified liquidation process is intended to ensure greater returns to creditors and employees. These changes are particularly important to support the many small businesses facing an uncertain future because of the economic impact of the Coronavirus.

3.4 Schedule 3 provides the requirements for adopting the simplified liquidation process, including that the company is insolvent and has entered into a creditors' voluntary liquidation. To make the simplified liquidation process available only to companies that are expected to have relatively simple affairs, the total liabilities of the company must not exceed an amount to be prescribed in the Corporations Regulations.

3.5 Safeguards apply to eligibility for the simplified liquidation process and require that a director of the company must not have previously used the simplified liquidation process and that the company has complied with taxation laws. Directors must make a declaration in relation to these matters. Further, creditors remain empowered to opt-out of the simplified liquidation process, through providing a request to the liquidator not follow the simplified liquidation process. To encourage an efficient process, once a company enters liquidation (after

1 January 2021), the liquidator must adopt the simplified liquidation process within 20 business days.

3.6 The simplified process itself is a modified version of the process for a creditors' voluntary winding up set out in the Corporations Act (in particular Chapter 5 and the Insolvency Practice Schedule), the Corporations Regulations (in particular, Chapter 5) and the Insolvency Practice Rules. The simplified liquidation process modifies the general process by disapplying certain features of the general process relating to reporting to ASIC, convening meetings, and the appointment of reviewing liquidators and committees of inspection. Further provision for the features of the simplified liquidation process is to be made in the Corporations Regulations. Schedule 3 sets out the scope of these regulations.

3.7 Schedule 3 also provides for the circumstances in which a liquidation will cease to be a simplified liquidation, including where the eligibility criteria are no longer met and in circumstances to be prescribed by the Corporations Regulations.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A liquidator may adopt the simplified liquidation process if the eligibility criteria is satisfied.	No equivalent. All liquidations resulting from a creditors' voluntary winding up follow the same process.
The regulations may provide for giving information, providing reports and producing documents to ASIC in relation to a company that is the subject of the simplified liquidation process.	If it appears to a liquidator in the course of a winding up of the company that the company may have engaged in particular wrongdoing or may be unable to pay its unsecured creditors more than 50 cents in the dollar, the liquidator must lodge a report with ASIC.
Under a simplified liquidation process, a liquidator may not convene a meeting of creditors at any time, cannot be directed to convene a meeting of creditors by ASIC or by creditors, and is not required to convene a meeting of creditors in certain circumstances.	A liquidator may convene a meeting of creditors at any time. A liquidator must convene a meeting if directed to do so by ASIC or by creditors or when required in certain other circumstances.

<i>New law</i>	<i>Current law</i>
Under a simplified liquidation process, creditors may not appoint a committee of inspection to monitor the liquidation and to give assistance to the liquidator.	Creditors of a company in liquidation may decide that there is to be a committee of inspection to monitor the liquidation and to give assistance to the liquidator.
Under a simplified liquidation process, ASIC and creditors cannot appoint a reviewing liquidator to carry out a review of the liquidation. However, the Court retains the power to appoint a reviewing liquidator. The Court also retains its power to inquire into the liquidation.	In addition to the Court being empowered to appoint a reviewing liquidator to carry out a review of the liquidation, creditors and ASIC can also appoint a reviewing liquidator.
The regulations may provide for further specific rules for the simplified liquidation process.	No equivalent.
A liquidator must cease to follow the simplified liquidation process in certain circumstances.	No equivalent.

Detailed explanation of new law

The simplified liquidation process

3.8 The liquidation of an insolvent company allows an independent registered liquidator (the liquidator) to take control of the company so its affairs can be wound up in an orderly and fair way to benefit creditors. The most common type is a creditors' voluntary liquidation, which begins when an insolvent company's shareholders resolve to liquidate the company and appoint a liquidator or when creditors vote for liquidation following a voluntary administration or a terminated deed of company arrangement.

3.9 In a liquidation, a liquidator has a duty to all company creditors, their role is to:

- protect, collect and sell the company's assets;
- investigate and report to creditors about the company's affairs;
- inquire into the failure of the company – and possible offences by people involved with the company – and report to ASIC; and

-
- distribute money from the collection and sale of assets after payment of the costs of the liquidation – first to priority creditors, including employees, and then to unsecured creditors.

3.10 The liquidation process is set out in Chapter 5 of the Corporations Act and Chapter 5 of the Corporations Regulations, as well as the Insolvency Practice Schedule and the Insolvency Practice Rules.

3.11 Chapter 5 of the Corporations Regulations gives further effect to the provisions of Chapter 5 the Corporations Act. In particular, the Corporations Regulations prescribe rules for the proof and claim of debts by known and unknown creditors, declaring and distributing a dividend, dealing with contributories, and publishing information.

3.12 The Insolvency Practice Schedule, contained in Schedule 2 to the Corporations Act, makes further provision for a creditors' voluntary liquidation. This includes information and reports that must be given by the liquidator, when and how meetings are to be held, and mechanisms to review the conduct of the liquidation. The Insolvency Practice Schedule also sets out the process and requirements for registering liquidators and disciplining registered liquidators.

3.13 The Insolvency Practice Rules are a legislative instrument made under the Insolvency Practice Schedule. The Insolvency Practice Rules provide specific rules relating to matters contained in the Insolvency Practice Schedule.

3.14 The simplified liquidation process for a creditors' voluntary winding up does not create a new liquidation process, or disturb the framework established by the Corporations Act and the relevant subordinate instruments. Rather, the simplified liquidation process preserves and applies most of the existing framework and adopts small changes for a more fit-for-purpose and efficient process.

3.15 Where the simplified liquidation process departs from the regular process, it does so:

- by providing in the Corporations Act that particular aspects of the regular process do not apply to the simplified process; and
- through supporting regulations that create specific rules relevant to the simplified process.

3.16 The simplified liquidation process is only available in a creditor's voluntary liquidation. Therefore, a liquidator will be unable to adopt the simplified liquidation process in a member's voluntary winding up or a winding up ordered by the Court.

3.17 Schedule 3 provides for parts of the process where the simplified liquidation departs from the regular process as well as the requirements for entering and exiting the process.

Entry into the simplified liquidation process

3.18 Where a liquidator believes on reasonable grounds that a company in a creditors' voluntary winding up meets the eligibility criteria, the liquidator may adopt the simplified liquidation process instead of the regular liquidation process. *[Schedule 3, item 6, section 500A(1) of the Corporations Act]*

3.19 The **eligibility criteria** for the simplified liquidation process will be met for a company if:

- the company has passed, or is taken to have passed, a special resolution that the company be wound up voluntarily;
- the directors have given the liquidator a report about the company's affairs and a declaration that the company will be eligible for the simplified liquidation process;
- the company is insolvent;
- the total liabilities of the company do not exceed the amount to be prescribed in the regulations;
- no director has been a director of a company that has previously used the simplified liquidation process or a debt restructuring process; and
- the company's tax lodgements are up to date.

[Schedule 3, item 6, section 500AA of the Corporations Act]

3.20 However the liquidator must not adopt the process if any one of the following exclusions apply:

- more than 20 days have passed since the relevant triggering event that brought the company into liquidation;
- the liquidator has not notified members and creditors of the company that they have a reasonable belief that the company is eligible for the simplified liquidation process and provided an opportunity for creditors to opt-out of the simplified liquidation process; or
- creditors of the company have requested the liquidator not adopt the simplified liquidation process.

[Schedule 3, item 6, section 500A(2) and (3) of the Corporations Act]

3.21 These matters are discussed in further detail below.

Eligibility criteria for entering the simplified liquidation process

The company has resolved to be wound up voluntarily

3.22 To be eligible for a simplified liquidation, the company must have resolved to wind up and enter into a liquidation process. [*Schedule 3, item 6, section 500AA(1)(a) of the Corporations Act*]

3.23 Generally, a company resolves to wind up under section 491 of the Corporations Act. This involves a company resolving to wind up by special resolution (requiring that the resolution has been passed by at least 75 per cent of the votes cast by members entitled to vote on the resolution).

3.24 However, in other circumstances, a company is taken to have resolved to wind up because the Corporations Act treats the company as having made a resolution under section 491. These other triggering events also satisfy the requirement that the company must have resolved to wind up. These other triggering events occur where:

- the creditors of a company under administration resolve that the company be wound up (see paragraphs 439C(c) and 446A(1)(a) and subsection 446A(2) of the Corporations Act);
- a company under administration fails to execute a deed of company arrangement in the time required (see paragraph 446A(1)(b) and subsections 444B(2) and 446A(2) of the Corporations Act);
- the creditors of a company under administration pass a resolution terminating a deed of company arrangement executed by the company and resolve that the company be wound up (see section 445E, paragraph 446A(1)(c) and subsection 446A(2) of the Corporations Act);
- the Court orders the termination of a deed of company arrangement (see section 445D, paragraph 446AA(1)(a) and subsection 446AA(2) of the Corporations Act);
- a company has executed a deed of company arrangement that specifies circumstances in which the deed is to terminate and those circumstances exist (see paragraph 446AA(1)(b) and subsection 446A(2) of the Corporations Act); and
- the Corporations Regulations prescribe circumstances in which a company is taken to have passed a special resolution that the company be wound up and those circumstances exist (see section 446B of the Corporations Act).

[*Schedule 3, item 3, section 489F of the Corporations Act*]

3.25 A triggering event does not occur where a company is taken to have passed a resolution under section 489EB of the Corporations Act (relating to where ASIC has ordered the winding up of a company).
[Schedule 3, item 3, section 500AA(1)(a) of the Corporations Act]

The directors have given a report and a declaration to the liquidator

3.26 Within 5 days following the triggering event, the directors must provide the liquidator with:

- a summary of the company's affairs; and
- a declaration for eligibility for the simplified liquidation process

[Schedule 3, item 4, section 498 and section 500AA(1)(b) of the Corporations Act]

3.27 The summary of the company affairs must include information relating to the company's business, property, affairs and financial circumstances. This is required under subsection 497(4) of the Corporations Act, in the report known as the Report on Company Affairs and Property. The Corporations Act requires that the report is also lodged with ASIC.

3.28 Following certain triggering events, a company is taken to have complied with section 497 of the Corporations Act – see, for example, subsection 446A(3). In these instances, the company is taken to have provided the summary on the company affairs required by section 497.

3.29 The directors must also provide the liquidator with a declaration that they reasonably believe that the company will meet the features of the eligibility criteria for entry into the simplified liquidation process. The purpose of the declaration is to provide the liquidator with a degree of assurance that the directors have inquired into the key elements of the eligibility criteria for the simplified liquidation process and have a reasonable belief that the company will meet those criteria. *[Schedule 3, item 6, section 498 and section 500AA(1)(b) of the Corporations Act]*

3.30 Particularly, if the directors believe on reasonable grounds that the eligibility criteria for the simplified liquidation process will be met, they must declare that:

- the company is insolvent;
- the liabilities of the company do not exceed the amount to be prescribed in the regulations;
- no director has been a director of a company that has previously used the simplified liquidation process or a debt restructuring process; and
- the company's tax lodgements are up to date.

3.31 If a director provides false or misleading information in the declaration, the director may be subject to civil or criminal penalties under section 1308 of the Corporations Act. These are existing penalties within the Corporations Act penalties framework, and provide an appropriate level of deterrence in relation to directors providing information to the liquidator that may be false or misleading.

3.32 ASIC is empowered to prescribe a form in which the directors' declaration is to be contained. If a form is not prescribed for this purpose, the declaration must be made in writing. *[Schedule 3, item 6, section 498(2)(b) of the Corporations Act]*

3.33 Regulations may also be made that prescribe further information that must be given in the directors' declaration. *[Schedule 3, item 6, section 498(2)(c) and (3) of the Corporations Act]*

The company is insolvent

3.34 The eligibility criteria requires that the company must not be able to pay its debts in full within a period not exceeding 12 months after the day of the triggering event. *[Schedule 3, item 6, section 500AA(1)(c) of the Corporations Act]*

3.35 The simplified liquidation process provides a time and cost efficient process for winding up a company in financial distress, such as a creditor's voluntary winding up. Therefore, the simplified liquidation process is not appropriate for a member's voluntary liquidation which allows a solvent company's affairs to be wound up.

The liabilities test

3.36 The eligibility criteria requires that if the regulations prescribe criteria that must be satisfied in relation to the liabilities of the company, then those criteria must be satisfied. *[Schedule 3, item 6, section 500AA(1)(d) of the Corporations Act]*

3.37 The Corporations Regulations may provide, for example, the amount of the debt of a company seeking to enter into the simplified liquidation process that is due and payable. This will be assessed on the particular day that the triggering event occurred.

3.38 The criteria to be prescribed in the regulations about the liabilities of the company will reflect the intention that the simplified liquidation process is most appropriate for small businesses with non-complex liabilities. For these companies, the costs of the regular liquidation process can consume all or almost all of the remaining value of a company, leaving little for creditors and employees.

3.39 Allowing the threshold amount to be prescribed in regulations is necessary to ensure that the simplified liquidation process is flexible and over time remains available to companies whose liabilities are of a size for which the simplified liquidation process is appropriate.

3.40 A company seeking to enter a simplified liquidation or debt restructuring process (described in Chapter 1) must satisfy criteria to be prescribed in regulations regarding its liabilities. For consistency, it is intended that the relevant criteria for the debt restructuring process and the simplified liquidation process are consistent to the extent that is appropriate.

No directors have previously used a simplified liquidation process or a debt restructuring process

3.41 The eligibility criteria requires that, subject to any exceptions prescribed in the regulations, no director of the company has been a director of a company that has been the subject of a simplified liquidation process or a debt restructuring process. This will be assessed from the day of the triggering event. *[Schedule 3, item 6, section 500AA(1)(e) of the Corporations Act]*

3.42 This is an important safeguard for the simplified processes and is targeted at preventing a pattern of behaviour from directors that could indicate illegal phoenixing activity or another form of corporate misconduct.

3.43 The regulations may prescribe circumstances in which a director is exempt from the requirement that they have not previously used either the debt restructuring or simplified liquidation process, and may also prescribe the period of time in which a previous use is relevant for the purposes of the rule. For example, in circumstances where a company was previously in a small business restructuring and then enters liquidation—the regulations may prescribe that a director is exempt from the requirement that they have not previously used a restructuring process or a simplified liquidation process. Allowing regulations to prescribe these matters is necessary to ensure that the rule is appropriately targeted and captures the sorts of behaviour that are intended to be excluded from the simplified processes. *[Schedule 3, item 6, section 500AA(1)(e) and (2) of the Corporations Act]*

3.44 The requirement that no director of the company has previously used a simplified process is consistent with the criteria for entry into the debt restructuring process and is described in relation to those amendments in Chapter 1.

3.45 A company seeking to enter a simplified liquidation process or debt restructuring process (described in Chapter 1) must satisfy criteria to be prescribed in regulations regarding its previous use of these processes. For simplicity, it is intended that the relevant criteria for both the debt restructuring process and the simplified liquidation process are consistent to the extent that is appropriate.

The company's tax lodgements are up to date

3.46 The eligibility criteria requires that the company's tax lodgements are up to date. Particularly, the company must have given returns, notices, statements, applications or other documents as required by taxation laws (within the meaning of the *Income Tax Assessment Act 1997*) to the Australian Taxation Office. This is an important safeguard and prevents a company with outstanding tax lodgement obligations from obtaining the benefit of the simplified liquidation process. [*Schedule 3, item 6, section 500AA(1)(f) of the Corporations Act*]

Exclusions for entering the simplified liquidation process

More than 20 days have passed since the relevant triggering event

3.47 The liquidator must not adopt the simplified liquidation process if more than 20 business days have passed since the day on which the triggering event occurred. The triggering events are described above in relation to the eligibility requirement that the company has passed, or is taken to have passed, a resolution that the company be wound up. This reflects the intention that the simplified process provides time efficiencies for creditors and encourages efficient compliance with the preliminary steps—for example, provision of the director's declaration if directors intend for the liquidator to adopt the simplified process. [*Schedule 3, item 6, section 500A(2)(a) of the Corporations Act*]

The liquidator has not notified members and creditors of the company

3.48 The liquidator must not adopt the simplified liquidation process if the liquidator has not given each member and creditor of the company a notice containing information about the simplified liquidation process. [*Schedule 3, item 6, section 500A(2)(b) of the Corporations Act*]

3.49 The notice must contain the following:

- a statement that the liquidator believes on reasonable grounds that the company meets the eligibility criteria for the simplified liquidation process;
- an outline of the simplified liquidation process, including any particular information prescribed in the Corporations Regulations;
- a statement that the liquidator will not adopt the simplified liquidation process if at least 25 per cent in value of the creditors direct the liquidator to do so; and
- any information prescribed in the Corporations Regulations about how a creditor may direct the liquidator not to adopt the simplified liquidation process.

3.50 The notice must be given at least 10 business days before adopting the simplified liquidation process. *[Schedule 3, item 6, section 500A(3) of the Corporations Act]*

3.51 The requirement for the liquidator to provide this notice reflects the intention that creditors are provided with information about what the simplified liquidation process involves and also provided with an opportunity to request the liquidator not adopt the simplified process.

3.52 The Corporations Regulations may prescribe particular information to be included in the notice, as well as information relating to the process to be followed for a creditor to direct the liquidator not adopt the simplified process. It is necessary and appropriate for these matters to be prescribed in regulations because they deal with relevant administrative detail for which the Government requires the flexibility to make timely changes.

Creditors of the company have requested the liquidator to not adopt the simplified liquidation process

3.53 The liquidator must not adopt the simplified liquidation process if at least 25 per cent in value of the creditors request the liquidator not to follow the simplified liquidation process in relation to the company (the 25 per cent test). *[Schedule 3, item 6, sections 500A(2)(c) and 500AB of the Corporations Act]*

3.54 In the simplified liquidation process creditors remain empowered to request the liquidator to not adopt the simplified process. For example, creditors may request the liquidator in this way because they do not think the simplified process is suitable for the company or because it would not provide the best outcome for creditors.

3.55 In assessing whether the 25 per cent test is met, the value of the creditors at the time of an assessment is worked out by reference to the value of the creditors' claims against the company that are known at that time. *[Schedule 3, item 6, section 500AD of the Corporations Act]*

3.56 The Corporations Regulations may also prescribe creditors that are, or are not, to be taken into account for the purposes of the 25 per cent test. The capacity for the regulations to refine the operation of the 25 per cent test is necessary and appropriate to deal with integrity issues. For example where a single large creditor may be able to influence the outcome of the 25 per cent test contrary to the wishes of a large number of smaller creditors. *[Schedule 3, item 6, section 500AD of the Corporations Act]*

3.57 Where creditors request the liquidator not adopt the simplified liquidation process and the liquidator ceases to use the simplified process, the company remains in liquidation under the regular process for a creditors' voluntary winding up. The power for creditors to direct the liquidator to not follow the simplified liquidation process is limited to the

period before the simplified process is adopted. [*Schedule 3, item 6, sections 500A(2)(c) and 500AB of the Corporations Act*]

Features of the simplified liquidation process

3.58 The simplified liquidation process preserves and applies most of the framework that applies to a regular liquidation. However, to create a more efficient process that is suitable for the liquidation of small companies, the simplified liquidation process departs from the regular process:

- by providing in the Corporations Act that particular aspects of the regular process do not apply to the simplified process; and
- through supporting regulations to provide specific rules relevant to the simplified process. [*Schedule 3, item 6, section 500AE of the Corporations Act*]

Reducing investigation and reporting requirements

3.59 Section 533 of the Corporations Act requires a liquidator of a company in the course of winding up the company to report to ASIC about suspected wrongdoing. Particularly, a liquidator must report to ASIC as soon as practicable if it appears to the liquidator that:

- a person involved with the company may have been guilty of an offence in relation to the company;
- a person involved with the formation or management of the company may have become accountable for any money or property of the company or may have breached duties owed to the company; or
- the company may be unable to pay its unsecured creditors more than 50 cents in the dollar.

3.60 Under section 533, the liquidator may also report to ASIC about any other matter that, in the opinion of the liquidator, is desirable to bring to the attention of ASIC.

3.61 These reports, and the investigative duties that underpin them, present a significant component of the costs to a liquidation. In particular, reports lodged under section 533 of the Corporations Act require the liquidator to undertake detailed investigations, which can incur significant costs. For small businesses, these obligations can consume large proportions of remaining assets, potentially leaving creditors with no returns and insolvency practitioners bearing the costs.

3.62 For smaller businesses, this intense investigative requirement will often be disproportionate to any benefit gained by the company or

more generally by the regulator. Therefore, these investigations are often not fit-for-purpose for small companies with non-complex debts.

3.63 For these reasons, the section 533 report is not a feature of the simplified liquidation process. The removal of this obligation is expected to result in time and cost efficiencies. [*Schedule 3, item 6, section 500AE(2)(a) of the Corporations Act*]

3.64 In place of the section 533 report, the regulations will prescribe rules relating to the giving of information, providing reports and producing documents to ASIC. In this way, the regulations will provide for a more fit-for-purpose reporting process which reduces the burden on liquidators without undermining confidence in the insolvency regime.

Reducing meetings

3.65 In a regular liquidation process, a liquidator may convene a creditors meeting at any time. This may be to inform creditors about the liquidation process, to find out the creditors' wishes on a matter or to seek approval of the liquidator's fees. In certain circumstances, the liquidator must convene a meeting, such as when directed to do so by certain creditors or by ASIC. These circumstances are provided for in Division 75 of the Insolvency Practice Schedule.

3.66 The simplified liquidation process removes the obligation for a liquidator to convene these meetings. Instead, the liquidator will continue to provide information to creditors electronically and proposals will be put by giving notice to creditors or contributories (see section 75-40 of the Insolvency Practice Schedule, and sections 75-130 and 75-135 of the Insolvency Practice Rules). [*Schedule 3, item 6, sections 500AE(2)(b), (2)(c) and (2)(d) of the Corporations Act*]

3.67 The removal of requirements relating to meetings is intended to assist in providing a more cost and time efficient liquidation process.

Committees of inspection and reviewing liquidators

3.68 In a regular liquidation process, creditors may appoint a committee of inspection to monitor the conduct of the liquidation and to give assistance to the liquidator. The committee of inspection plays an advisory and oversight role, including approving the liquidator's fees. Similarly, ASIC, the Court or creditors of a company may appoint a registered liquidator to review the liquidation of the company, including by looking at whether the remuneration of the appointed liquidator is reasonable and whether costs and expenses have been properly incurred.

3.69 While committees of inspection and reviewing liquidators are valuable oversight and advisory mechanisms in a more complex liquidations, in less complex liquidations they can increase the cost of a liquidation and lengthen the process. These mechanisms are generally not

appropriate for small liquidations with non-complex debts. For these reasons, committees of inspection and reviewing liquidators appointed by ASIC and by creditors are not features of the simplified liquidation process. [*Schedule 3, item 6, sections 500AE(2)(e) and (f) of the Corporations Act*]

3.70 Importantly, the Court's oversight powers are retained for the simplified liquidation process. This includes the Court's power to appoint a reviewing liquidator. Further, the Court may inquire into a liquidation either on its own initiative or on the application of the company, the liquidator, ASIC or a person with a financial interest in the external administration of the company (such as a creditor of the company). The Court has a wide range of powers to make orders, including an order to replace the liquidator.

Features to be provided in the Corporations Regulations

3.71 Regulations may be made to provide further elements of the simplified liquidation process.

Unfair preferences and voidable transactions

3.72 Part 5.7B of the Corporations Act allows liquidators to recover property or compensation for the benefit of creditors of an insolvent company. Particularly, liquidators can pursue certain types of voidable transactions which were entered into by the company before the winding up which had the effect of conferring a preference on one creditor or providing a benefit on a related party or creditor to the detriment of other creditors. The power to pursue amounts that have been unfairly or incorrectly paid to another party is a valuable tool for a liquidator and can result in more funds for distribution. However, in the liquidation of a small company with limited assets, these proceedings can take up time, money and resources, and have the potential to outweigh any benefit that might flow through to creditors.

3.73 Regulations may be made to provide circumstances in which a transaction is not an unfair preference under section 588FA or a voidable transaction under section 588FE for companies in the simplified liquidation process. For example, regulations could prescribe that, for the purposes of the simplified liquidation process, an unfair preference must relate to a transaction of a certain value or that transaction is voidable only if it occurred in a certain period. The intention of these regulations would be to better target the sorts of unfair preferences and voidable transactions that are available to be pursued in the simplified liquidation process. [*Schedule 3, item 6, sections 500AE(3)(a) and (b) of the Corporations Act*]

Proofs of debt or claim and payment of dividends

3.74 To provide time and cost efficiencies in the simplified liquidation process, regulations may be made to improve the process for proving debts or claims (currently set out in Part 5.6 of the Corporations

Regulations) in relation to a company that is subject to the simplified liquidation process. These regulations may prescribe administrative detail relating to how proofs of debt and claim may be prepared, submitted, withdrawn, and admitted. The regulations may also prescribe administrative detail relating to the identification of contributories and the declaration and payment of a dividend. *[Schedule 3, item 6, sections 500AE(3)(c), (d) and (e) of the Corporations Act]*

Information, reports and documents

3.75 Regulations may be made to provide for giving information, providing reports and producing documents to ASIC in relation to a company that is the subject of the simplified liquidation process. For example, the regulations may prescribe that certain reports must be made to ASIC in the course of a simplified liquidation process where particular information comes to the attention of the liquidator. The intention of these regulations would be to ensure that ASIC is provided with appropriate information regarding the conduct of simplified liquidations, enabling the regulator to carry out its oversight role. *[Schedule 3, item 6, section 500AE(3)(f) of the Corporations Act]*

Exiting the simplified liquidation process

3.76 In certain circumstances, the liquidator must cease to follow the simplified liquidation process. These circumstances are where:

- the eligibility criteria for the simplified liquidation process are no longer met in relation to the company;
- other circumstances prescribed by the Corporations Regulations exist.

3.77 Where a liquidator ceases to follow the simplified liquidation process, the company remains in liquidation though under the regular process for a creditors' voluntary winding up. The Corporations Regulations may provide for the transition from a simplified liquidation process into the regular liquidation process.

3.78 These matters are described in further detail below.

Ceasing to follow the simplified liquidation process

The eligibility criteria is no longer met

3.79 In the course of undertaking the simplified liquidation process, it may come to the attention of the liquidator that the company does not meet the eligibility criteria. When this occurs, the liquidator must exit the simplified liquidation process. This may occur, for example, because the liquidator becomes aware of a creditor which causes the total liabilities of the company to rise above the threshold amount. *[Schedule 3, item 6, section 500AC(1)(a) of the Corporations Act]*

Circumstances prescribed by the Corporations Regulations

3.80 The Corporations Regulations may prescribe further circumstances in which the liquidator must cease to follow the simplified liquidation process. This power to make regulations may be used, for example, to prescribe circumstances where wrongdoing in the company is uncovered in the process of the liquidation which would indicate that the company is not of the sort that should be undertaking the simplified liquidation process. It is necessary for the integrity of the simplified liquidation process for the Government to have the capacity to provide for circumstances in which a liquidator must cease to follow the simplified process. *[Schedule 3, item 6, section 500AC(1)(b) of the Corporations Act]*

Transitioning into another process

3.81 Where a liquidator ceases to follow the simplified liquidation rules because of one of the circumstances described above, the creditors' voluntary winding up is still in progress and the company remains in liquidation – however the liquidator must follow the regular process for a creditors' voluntary liquidation rather than those modified for the simplified liquidation process.

3.82 In addition to providing for circumstances where the liquidator must exit the simplified liquidation, the Corporations Regulations may also provide for the transitional requirements for exiting a simplified liquidation process and entering a regular liquidation process. These regulations may deal with the process to be followed in relation to, for example, proofs of debt and claim, ranking debts and claims, identifying contributories, declaration and payments of dividends, and reports and information to be provided to ASIC.

3.83 Where the regular and simplified processes differ, it is necessary for regulations to deal with circumstances where elements of the liquidation process may have been completed or underway at the time the liquidation left the simplified process and to provide for how the liquidation is to proceed under the regular process. In this way, regulations providing for the transition between the simplified process and the regular process may provide that the Corporations Act has effect with any modifications prescribed by the regulations. Providing for these transitional matters in the regulations is necessary to provide a smooth transition into the regular liquidation process. Further, it is appropriate to provide for these matters in regulations as they relate to administration and detail for which the Government requires the flexibility to make timely changes. *[Schedule 3, item 6, sections 500AC(2) and (3) of the Corporations Act]*

Corporations Regulations

3.84 The Bill provides a range of regulation-making powers to provide flexibility and specificity for the simplified liquidation process.

3.85 For entry into the simplified liquidation process, the regulations may provide for:

- information that must be contained in a director's declaration prior to entering into a simplified liquidation process;
- information about the simplified liquidation process that must be given to members and creditors of a company prior to entering into a simplified liquidation;
- information about how a creditor may give a direction to a liquidator not to adopt the simplified liquidation process, and prescribe classes of creditors that are, or are not, taken into account for this purpose;
- criteria that must be satisfied in relation to the liabilities of the company;
- the period of time in which a director of a company must not have been through a simplified liquidation or debt restructuring process, and circumstances in which a director is exempt from this requirement.

3.86 For the simplified liquidation process itself, the regulations may provide for:

- circumstances in which a transaction is not an unfair preference;
- circumstances in which a transaction is not voidable;
- proofs of debt or claim;
- declaration and payment of a dividend;
- identification of a contributory; and
- giving information, report or documents to ASIC.

3.87 For exiting the simplified liquidation process, the regulations may provide:

- for transitional rules where a simplified liquidation moves into a regular liquidation process; and
- that the Act has effect with any modifications prescribed by the regulations.

3.88 In relation to the power for the Corporations Regulations to provide for cases where a liquidation moves from a simplified to a regular

liquidation process, and to the extent that this power constitutes a power to modify the operation of the Corporations Act – the power is necessary to deal with the situations where the operation of the Act may produce unintended or unforeseen results that are not consistent with the policy intention for the new regime. Issues may arise that were not contemplated at the time of drafting because the simplified process is a new regime. Further, because this new regime has been developed in response to the significant and continuing economic consequences of Coronavirus, there is greater than usual need for the Government to be empowered to deal with unintended or unforeseen consequences, particularly those that risk undesirable outcomes for companies and creditors. In this context, it is appropriate for the Government to be able to address these potential consequences where the issues are too specific to be dealt with adequately, and in a timely manner, in the primary law.

3.89 The range of regulation-making powers provides the Government with the appropriate and necessary flexibility to make timely changes to support external administrators to complete liquidations that are cost and time efficient. The economic uncertainty of the Coronavirus outbreak places particular pressure on small businesses, and providing specificity in regulations allows the process to respond quickly to developments that occur from the expected increase in the number of insolvencies. In this way, regulations are appropriate to ensure that the simplified liquidation process best reflects the needs of small businesses.

3.90 The regulations would be subject to disallowance, and therefore, subject to the appropriate parliamentary scrutiny.

Consequential amendments

3.91 Definitions for the terms *eligibility criteria* and *simplified liquidation process* are inserted into dictionary in section 9 of the Corporations Act. The terms have the meanings given by sections 500AA and 500AE respectively, which are described above. [*Schedule 3, item 6, section 9 of the Corporations Act*]

3.92 Other minor consequential amendments are made to create new headings in Chapter 5 of the Corporations Act to reflect the creation of the new simplified liquidation process.

Application and transitional provisions

3.93 The amendments in Schedule 3 apply in relation to the winding up of a company under a special resolution that has passed, or is taken to have passed, under section 491 on or after 1 January 2021. The effect of this is that a liquidator cannot adopt the simplified liquidation process

where the company being wound up entered liquidation before 1 January 2021. *[Schedule 3, item 7, section 1681 of the Corporations Act]*

Commencement provisions

3.94 Schedule 3 to the Bill will commence the day after the Act receives the Royal Assent. *[Item 2 of the Bill]*

Chapter 4

Refinements to the registration of liquidators

Outline of chapter

4.1 Schedule 3 to the Bill amends the requirements for registration as a liquidator.

Summary of new law

4.2 Schedule 3 amends the existing liquidation registration requirements to provide more flexibility to committees considering applications for registration as a liquidator. The amendments provide that the committee may decide that an applicant should be registered even if the committee is not satisfied of particular criteria.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Where a committee is considering an application by a person for registration as a liquidator, the committee may decide that the applicant should be registered even if the committee is not satisfied of particular criteria.	The committee may decide that the applicant should be registered if the committee is not satisfied of particular criteria, but only if the committee specifies conditions.

Detailed explanation of new law

4.3 Under the current law, an individual may apply to ASIC to be registered as a liquidator. The application is referred to a committee, which assesses the application against specified criteria (the applicant's qualifications, conduct and fitness and whether the applicant will take out appropriate insurance). The committee reports its decision to ASIC and, if the committee decides that the applicant should be registered, ASIC registers the applicant as a liquidator.

4.4 In assessing an application, the committee may decide that the applicant should be registered even if the committee is not satisfied that the applicant meets particular criteria provided the committee is satisfied that the applicant would be suitable to be registered if the applicant complied with certain conditions. The particular criteria to which this rule relates are that the applicant:

- has the qualifications, experience, knowledge and abilities set out in the Insolvency Practice Rules;
- has not had his or her registration as a liquidator cancelled within 10 years (other than in response to a request by the applicant to have the registration cancelled);
- has not had his or her registration as a trustee under the *Bankruptcy Act 1966* cancelled within 10 years (other than in response to a request by the applicant to have the registration cancelled); and
- is resident in Australia or in another prescribed country.

4.5 Schedule 3 amends section 20-20 of the Insolvency Practice Schedule to allow the committee to approve the registration of a liquidator if the applicant does not satisfy the criteria listed above without conditions provided the applicant would be suitable to be registered as a liquidator. These amendments give the committees, convened by ASIC, greater flexibility to decide that a person is suitable to be registered as a liquidator. [*Schedule 3, item 8, section 20-20(5) of Schedule 2 to the Corporations Act*]

4.6 The committee retains the flexibility to make the registration subject to certain conditions if it is appropriate to do so. This flexibility encourages a greater diversity of practitioners into the field, and greater resilience of the sector. [*Schedule 3, item 9, section 20-20(6) of Schedule 2 to the Corporations Act*]

Application and transitional provisions

4.7 Schedule 3 to the Bill will commence the day after the Act receives the Royal Assent.

Chapter 5

Virtual meetings and electronic communications

Outline of chapter

5.1 Schedule 4 to the Bill expands the situations where documents relating to the external administration of a company may be given electronically. It also permits persons to sign documents relating to the external administration of a company electronically.

Summary of new law

5.2 Schedule 4 allows electronic communication to be used to give a document under the external administration provisions in Chapter 5 of the Corporations Act, the Insolvency Practice Schedule, Chapter 5 of the Corporations Regulations, the Insolvency Practice Rules or any other instrument made under Chapter 5.

5.3 The Schedule also allows documents relating to the external administration provisions to be signed electronically by using any reliable method to identify the signatory and indicate the signatory's intention. Signatories may sign different copies of the document, provided that the copy includes the entire contents of the original document.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>Any document relating to the external administration of a company may be provided by using electronic means if:</p> <ul style="list-style-type: none">• the recipient has nominated an electronic address or the sender has an address that they reasonably believe to be the recipient's recent electronic address; and• it is reasonable to expect that the document would be readily accessible so as to be useable for	<p>Only the specific notices covered by section 600G of the Corporations Act can be provided by electronic means if the recipient consents.</p>

subsequent reference at the time that the document is given.	
Documents relating to the external administration of a company may be signed electronically by using a method to identify the signatory and indicate the signatory's intention.	No equivalent.

Detailed explanation of new law

Types of documents that may be given and signed electronically

5.4 Electronic communications may be used to provide any document that is required or permitted to be given under:

- Chapter 5 of the Corporations Act (external administration);
- the Insolvency Practice Schedule in Schedule 2 to the Corporations Act;
- Chapter 5 of the Corporations Regulations (external administration);
- the *Insolvency Practice Rules (Corporations) 2016* or any other instrument made under Chapter 5 of the Corporations Act or the Insolvency Practice Schedule; and
- a transitional provision that relates to the external administration rules in Chapter 10 of the Corporations Act or an instrument made under Chapter 10.

[Schedule 4, item 20, section 600G(1) of the Corporations Act]

5.5 If any of those documents need to be signed, the document can be signed electronically. *[Schedule 4, item 20, section 600G(5) of the Corporations Act]*

5.6 A new definition of **document** is also inserted to ensure that the reforms apply to all information, including information that is not in a paper or material form. The new definition mirrors the definition of 'document' in the current version of the *Acts Interpretation Act 2001*. *[Schedule 4, item 1, definition of 'document' in section 9 of the Corporations Act]*

5.7 Documents that are required or permitted to be given to ASIC must be lodged with ASIC in accordance with the existing requirements. *[Schedule 4, item 20, section 600G(7) of the Corporations Act]*

Giving documents electronically

How documents may be provided

5.8 If a person wishes to provide a document electronically, they may do so by:

- giving the document to the person by using electronic communication (e.g., sending an email); or
- using electronic communication or traditional means to provide the person with details sufficient to allow them to access the document electronically (e.g., by giving them a card or sending them an email with a link to a website).

[Schedule 4, item 20, section 600G(2) and (3) of the Corporations Act]

5.9 An **electronic communication** is defined to mean a communication of information in the form of data, text, images or speech by means of electromagnetic energy. If the information is in the form of speech, the speech must be processed at its destination by an automated voice recognition system. This mirrors the definition in the ETA 1999.

[Schedule 4, item 1, definition of ‘electronic communication’ in section 9 of the Corporations Act]

5.10 These reforms are facilitative in nature. A sender may elect to give a document in the traditional way, e.g., by posting it to the recipient’s postal address.

Conditions that must be satisfied before giving documents electronically

5.11 There are two conditions that need to be satisfied before a document can be given electronically.

5.12 First, the recipient must have provided a **nominated electronic address**. *[Schedule 4, item 20, section 600G(4)(b) of the Corporations Act]*

5.13 A ‘nominated electronic address’ is the most recent electronic address provided by the creditor, company or other person for the purposes of receiving electronic communications unless the person sending the document knows, or there are reasonable grounds to believe, that the electronic address is not the correct address. For instance, a person may know that an email address is incorrect if they attempt to email a document but receive an error message stating that the email was undeliverable. *[Schedule 4, item 1, definition of ‘nominated electronic address’ in section 9 of the Corporations Act]*

5.14 If no electronic address has been nominated or the sender knows or has reasonable grounds to believe that the nominated address is incorrect, the sender may use an electronic address that he or she believes on reasonable grounds to be the person’s recent electronic address. This address is also considered to be a ‘nominated electronic address’.

[Schedule 4, item 1, definition of ‘nominated electronic address’ in section 9 of the Corporations Act]

5.15 Second, a document can only be provided electronically if it is reasonable to expect that the document would be readily accessible so as to be useable for subsequent reference at the time that the document is given. This replicates the condition in paragraph 9(1)(a) of the ETA 1999 which relates to when electronic means can be used to give information in writing. *[Schedule 4, item 20, section 600G(4) of the Corporations Act]*

5.16 The person providing the document does not need to satisfy the other conditions in section 9 of the ETA 1999. Those conditions require the recipient to consent to the use of electronic means and comply with any requirements of the Commonwealth agency that is receiving the information. These conditions were not included as they would have imposed high regulatory costs on industry and been significantly more restrictive than the relief provided by the Determination.

Time of receipt and dispatch

5.17 There are also new default rules for determining when an electronic communication is sent and received. These rules can be overridden by agreement of the parties. *[Schedule 4, item 2, section 105A(1) of the Corporations Act]*

5.18 The time of receipt and dispatch needs to be capable of being reliably determined as many requirements in the Corporations Act need to be undertaken within a prescribed time period.

5.19 The default rule for determining when an electronic communication is sent depends on whether the communication leaves the information system that is under the control of the originator (or the party who sent it on behalf of the originator).

- If the communication leaves a person’s information system (which is generally the case when correspondence is sent from a company to another company, creditor or shareholder), it is sent at the time that the communication leave the originator’s information system rather than the time when it enters the recipient’s information system.
- If the communication does not leave a person’s information system (for example, for correspondence sent within a company), the electronic communication is sent at the time that it is received by the addressee.

[Schedule 4, item 2, section 105A(2) of the Corporations Act]

5.20 An electronic communication is received when the electronic communication becomes capable of being retrieved by the addressee at the addressee’s ‘nominated electronic address’. *[Schedule 4, item 2, section 105A(4) and (5) of the Corporations Act]*

5.21 These rules apply even if the place where the information system supporting an electronic address is located is different from the place where the electronic communication is taken to have been sent or received. *[Schedule 4, item 2, section 105A(3) and (6) of the Corporations Act]*

5.22 The default rules for determining the time of dispatch and receipt are closely based on the rules in section 12A of the ETA 1999. The only exception is that the ETA 1999 has a more nuanced rule for determining the time of receipt where the electronic address has not been nominated by the addressee. In these circumstances, the rule in the ETA 1999 requires the addressee to have become aware that the electronic communication has been sent. This more nuanced approach was not adopted as it would be administratively difficult for a company if notices and documents sent to multiple creditors were taken to have been received by different persons at different times and the time of receipt could not be reliably determined in advance.

Place of receipt and dispatch

5.23 The default place of dispatch depends on whether the sender has a registered office.

- If the sender is a company, it is required to have a registered officer under section 142. In this case, the place of dispatch is the registered office.
- If the sender does not have a registered office, the place of dispatch is either the most recent physical address given by the sender to the other party. If no such address has been given, it is the originator's usual residential address.

[Schedule 4, item 2, section 105B(2)(b) and (c) of the Corporations Act]

5.24 A different rule applies to correspondence sent by a member to the company or registered scheme. In that case, the place of dispatch is the place listed on the register of members (which is required to include an address under section 169). This part of the definition is more likely to apply in context outside of Chapter 5. It has been included as part of these reforms in order to ensure that the definition is sufficiently comprehensive to cover the broader technology neutrality reforms that the Government has announced in the context of meetings. *[Schedule 4, item 2, section 105B(2)(a) of the Corporations Act]*

5.25 Corresponding rules apply to the place of receipt. *[Schedule 4, item 2, section 105B(3)]*

5.26 The parties have the flexibility to agree an alternative electronic address. *[Schedule 4, item 2, section 105B(1) of the Corporations Act]*

Signing documents electronically

5.27 A document may be signed electronically if the person indicates, by means of an electronic communication, that the person has signed the document. An example of this might be sending an electronically-signed document in an email with the covering message, ‘Please find attached my signed document’. *[Schedule 4, item 20, section 600G(5)(c) of the Corporations Act]*

5.28 The person must also use a method to identify the signatory and indicate the signatory’s intention. The method must satisfy the conditions in paragraphs 10(1)(a) and (b) of the ETA 1999, that is, it must be:

- as reliable as appropriate for the purpose of the communication; and
- proven in fact to have identified the signatory and their intention (by itself or together with further evidence).

[Schedule 4, item 20, section 600G(5)(d) and (e) of the Corporations Act]

5.29 The other conditions in section 10 of the ETA 1999 relating to consent and compliance with the requirements of a Commonwealth authority do not apply to documents provided in the context of external administration. This is designed to reduce the regulatory costs on industry.

5.30 It is not necessary for all persons to sign the same document. Instead, the signatories may sign different copies or counterparts of the document, provided that the copy or counterpart includes the entire contents of the original document. *[Schedule 4, item 20, section 600G(5) and (6) of the Corporations Act]*

5.31 Documents that are permitted or required to be given to ASIC may also be signed electronically. In situations where ASIC is required to make the document publicly available, the person may wish to remove any personal identifiers (such as their ISPN). *[Schedule 4, item 20, section 600G(8) of the Corporations Act]*

Amendments facilitating virtual meetings in the Insolvency Practice Rules

5.32 When making a pooling determination under section 571 of the Act, the liquidator may determine a contact address for the pooled group in the pooling determination. This is to ensure that standard rules for the time and place of a virtual meeting may be made in forthcoming amendments to the Insolvency Practice Rules. The amendment is necessary to ensure that the new standard rules are suitable for virtual meetings concerning a pooled group under external administration. *[Schedule 4, item 14, section 571(1)(ca) of the Corporations Act]*

Consequential amendments

5.33 Formerly, notes were required to identify the small subset of sections where the requirements to give a document could be satisfied by using electronic means. However, the new facilitative rules that provide for the use of electronic communication are much broader in scope than the former rules and apply to all documents provided under Chapter 5 of the Corporations Act. Accordingly, the notes are no longer needed and are repealed. *[Schedule 4, items 4-13, items 15-19 and items 22, 23 and 24, note to section 422B(4), notes 1 and 2 to section 436DA(3), note to section 436E(3), note to section 450A(3), note to section 450B, note to section 450C, note to section 450D, note to section 497(1), notes 1 and 2 to section 506A(2), note to section 568A(1), note to section 579J(1), notes 1 and 2 to sections 579J(2), notes 1 and 2 to section 579K(1), note to section 579K(2), notes 1 and 2 to section 579K(3) and note to section 579K(4) of the Corporations Act, and the notes to section 70-5(6), 70-6(4) and 70-6(5) of the Insolvency Practice Schedule]*

Application and transitional provisions

5.34 The rules in the Determination for holding meetings using electronic means and alternative technology do not apply to any meetings or documents covered by the new rules. The Determination remains in place and continues to apply to meetings held under other Chapters until the date that the Determination sunsets. *[Schedule 4, item 21, sections 1680 and 1680A of the Corporations Act]*

5.35 The Bill also confirms the validity of things done under the Determination. *[Schedule 4, item 3, section 1680C of the Corporations Act]*