# Improving schemes of arrangement to better support businesses

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# About the Business Law Section of the Law Council of Australia

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws adopted by the Law Council and the members of the Section. The Business Law Section conducts itself as a section of the Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, as well as enhance their professional skills.

The Law Council of Australia Limited itself is a representative body with its members being:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Operating as a section of the Law Council, the Business Law Section is often called upon to make or assist in making submissions for the Law Council in areas of business law applicable on a national basis.

Currently the Business Law Section has approximately 900 members. It currently has 15 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee
- Taxation Law Committee

- Technology in Mergers & Acquisitions Working Group

As different or newer areas of business law develop, the Business Law Section evolves to meet the needs or objectives of its members in emerging areas by establishing new working groups or committees, depending on how it may better achieve its objectives.

The Section has an Executive Committee of 11 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

Current members of the Executive are:

- Mr Greg Rodgers, Chair
- Mr Mark Friezer, Deputy Chair
- Mr Philip Argy, Treasurer
- Ms Rebecca Maslen-Stannage
- Professor Pamela Hanrahan
- Mr John Keeves
- Mr Frank O'Loughlin
- Ms Rachel Webber
- Ms Caroline Coops
- Dr Elizabeth Boros
- Mr Adrian Varrasso

The Section's administration team serves the Section nationally and is based in the Law Council's offices in Canberra.

# For Further Information

This submission is in response to the consultation paper *Helping Companies Restructure by Improving Schemes of Arrangement*[1] (**Consultation Paper**) and has been prepared by the Insolvency and Restructuring Committee (the **Committee**) of the Business Law Section of the Law Council of Australia.

The Section would be pleased to discuss any aspect of this submission.

Any queries can be directed to the chair of the Committee, Scott Butler, on 0448 939 439 or at Scott.Butler@hallandwilcox.com.au.

With compliments

**Greg Rodgers**
**Chair, Business Law Section**

[1] Paper issued by the Treasury dated 2 August 2021 (https://treasury.gov.au/consultation/c2021-190907)

# Overview Observations

1. The scheme of arrangement procedure contained in Part 5.1 of the *Corporations Act 2001* (Cth) (the **Act**), as regards creditors' schemes, in its current form has worked well and provided a useful and flexible mechanism to put in place arrangements between a large company[2] and its creditors or a class of its creditors. This has been particularly so following the introduction of the voluntary administration regime that has mostly absorbed more straight forward "barring" or "moratorium" arrangements. Since then, the scheme of arrangement procedure has been principally used to implement restructuring arrangements involving one or more classes of secured creditors of large enterprises or introducing efficiencies or compromises to facilitate large scale liquidations.

2. The Law Council encourages useful improvements to and, where appropriate, modernisation of the process for creditors' schemes of arrangement, and some suggestions are provided below in this regard.

3. However, practical experience has not suggested that the lack of an automatic moratorium has meant that fewer creditors' schemes are proposed or that companies have been impeded from proposing creditors' schemes.

4. There is much to be said for a broader review in relation to what reforms could be introduced to further support the restructuring of financially distressed businesses in the Australian context, particularly businesses other than large scale enterprises. Such a review could consider not only schemes of arrangement, but also whether further improvements could be made to the voluntary administration process in Part 5.3A of the Act, the restructuring process in Part 5.3B of the Act, as well as whether other processes could be adapted in this jurisdiction such as the company voluntary arrangement (**CVA**)[3] or the Part A1 moratorium[4] processes enacted in the United Kingdom.

5. Expansion and/or clarification of the discretionary moratorium power of the Court under s 411(16) should be considered. This may include modernising the language used in the section, confirming that the order applies to future and existing proceedings and clarifying that orders can be made to restrict enforcement of security or the rights of owners to recover their property (on appropriate terms).

6. Annexure A to this submission provides some additional general commentary on the legal framework of schemes of arrangement in Australia, potential advantages and disadvantages of that framework and some case examples of how schemes have been used recently in Australia.

[2] Or other Part 5.1 Body.
[3] See Part I of the *Insolvency Act 1986* (UK).
[4] See Annexure A at section 7.

# Submissions

**Question 1**: Should an automatic moratorium apply from the time that a Company proposes a scheme of arrangement? Should the automatic moratorium apply to debt incurred by the Company in the automatic moratorium period?

1. Recent practical experience has not suggested that the lack of an automatic moratorium is impeding the use of creditors' schemes of arrangement such as to indicate that the current regime requires reform. Two notable options presently exist to prevent creditors from enforcing rights to stifle a proposed creditors' scheme, namely a negotiated "standstill" and the statutory protections afforded by ss 411(16), 415D and 415F of the Act.

2. A desirable feature of the scheme of arrangement procedure is the breadth of the types of arrangements which can be proposed between a company and a class of its creditors. An automatic moratorium may not be necessary or appropriate in all situations. Examples of this type of situation include where the scheme is proposed by a company already in liquidation to improve the efficiency of the liquidation process, or where the scheme is to be proposed with a class of syndicated secured lenders where there is already significant support within the lender group for a scheme. In the "sophisticated" market, schemes of arrangement are usually preceded by a restructuring support agreement (or similar agreement) negotiated with a significant majority of the proposed class of the relevant creditors to be schemed. The restructuring support agreement in practice often includes "standstill" type provisions by which the supporting creditors that have entered into that agreement agree not to enforce, nor support the enforcement of, their security whilst the scheme is being proposed.

3. The existing legislative framework has the following moratorium provisions:

   - the discretionary moratorium which may be ordered under s 411(16) of the Act; and

   - the stay on enforcing rights provided for under ss 415D and 415F of the Act.

4. Annexure A contains more detailed commentary on the operation of these provisions.

5. Where a scheme proposal can be formulated, the Courts have demonstrated a preparedness to exercise the discretion to order a moratorium in terms of s 411(16) of the Act in appropriate cases.[5] Such an order can be made to address a risk that individual steps taken by creditors could give rise to a preference or bring about a frustration of the scheme procedure potentially forcing the company into voluntary administration or liquidation.[6] An alternative to introducing the automatic moratorium is expanding and/or clarifying the power of the Court under s 411(16). This may include modernising the language used in the section, clarifying that the order applies to future and existing proceedings and clarifying that orders can be made to restrict enforcement of security or the recovery of leased property (on appropriate terms). The role of the Court in initiating the moratorium also affords both a safeguard against misuse and the

[5] See, for example, *Re Boart Longyear Limited* [2017] NSWSC 537 at [12] - [13].
[6] See *Re Boart Longyear Limited* [2017] NSWSC 537 at [13].

capacity to mould the form of the moratorium to the circumstances of particular situations and set conditions to protect the interests of creditors where appropriate.

6. In addition, in relation to contracts made from 1 July 2018, the "ipso facto" reforms provide some further protections where the scheme of arrangement is sought to avoid the winding up of the company, subject to a number of policy based exceptions.[7]

7. That being said, other jurisdictions (e.g. the United Kingdom and Singapore) have introduced regimes which allow a company to invoke a brief automatic moratorium which can be used to propose a scheme of arrangement. If it were considered appropriate to introduce reforms in Australia to permit a similar automatic moratorium pending the formulation of a proposed scheme, a preferred model would be that the company could elect by appropriate notice to invoke an automatic moratorium for a short period (say 20 business days) with the continuation thereafter being at the discretion of the Court. The "opt in" approach may also be crafted such that the automatic moratorium only applies to a certain class or classes of creditors with which the scheme would be proposed.

8. In considering whether a moratorium should be introduced at an earlier time and in advance of a formulated scheme proposed, it is important to consider the impacts of such a moratorium on the rights of creditors and the possibility that the process could be misused. Under the scheme of arrangement procedure, there is no independent person appointed to the company whilst the scheme is being proposed who can scrutinise whether a moratorium is appropriate or should be continued. This dictates that any automatic moratorium period should be short, with the Court having the power to extend or terminate the moratorium.

9. It is accepted that only a relatively small number of creditors' schemes are approved each year. It is possible that an automatic moratorium, beyond that currently provided in s 415D of the Act, may encourage more companies to use creditors' schemes to facilitate restructures. However, schemes of arrangement are a special type of procedure, not suitable for all types of companies, and any automatic moratorium is probably only appropriate for certain companies in certain situations. Further, given the intensive nature of the scheme process (and the concomitant costs of the exercise), it questionable whether an expanded automatic moratorium would lead to a significant increase of the process being used.

10. If an automatic moratorium was to be made available, creditors affected by the moratorium should be given notice of the moratorium and the ability to apply to Court to terminate or modify the moratorium.

11. In any event, and whether improved or not, s 411(16) should be retained so that it can be utilised in situations where it is appropriate to do so. As to the second part of question 1, please refer to the response to question 6 below.

12. The responses to questions 2, 3, 4 and 6 should be read having regard to the response to this question.

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[7] See *Corporations Regulations 2001* (Cth) r 5.3A.50 and the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (Cth). Section 17 of the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* (Cth) provides that the "ipso facto" protections only apply to contracts entered into at or after 1 July 2018.

**Question 2**: Would the moratorium applied during voluntary administration be a suitable model on which to base an automatic moratorium applied during a scheme of arrangement? Are any adjustments to this regime required to account for the scheme context? Should the Court be granted the power to modify or vary the automatic stay?

13. The automatic moratorium which applies on the appointment of a voluntary administrator is now a relatively well understood reference point. However, that may not, of itself, make it the suitable model. In a voluntary administration, creditors' rights are protected insofar as control of the company moves to the voluntary administrator; whereas the directors remain in control whilst a scheme of arrangement is being proposed (except in cases where the scheme company is already in a form of external administration such as liquidation).

14. There appear to be several possible models for an automatic moratorium, including the following:

    - that the automatic moratorium only applies to the creditors with which the compromise or arrangement would be proposed and prevents the exercise of an expansive set of rights like in the voluntary administration regime;

    - the automatic moratorium could apply to all creditors but prevent a more limited scope of actions having regard to the differences between the scheme of arrangement procedure and voluntary administration, such as only preventing the commencement of winding up proceedings, appointing a receiver or an administrator by a secured creditor, or execution of any judgment, but does not prevent all litigation against the company (which may be appropriate to continue and be resolved in the normal way);

    - where the moratorium is for a very short period of time before Court review, the automatic moratorium applies to all creditors preventing the exercise of an expansive set of rights like in the voluntary administration regime.

15. Where the moratorium affects the exercise of rights by secured creditors under their securities or owners of property, consideration should be given as to whether appropriate protections for secured creditors and owners should be made. There is also presumably a need to consider the exceptions set out to the existing "ipso facto" protections and whether these should be applied to any automatic moratorium on the exercise of rights under securities or by owners of property.

16. In any event, the Court should be granted the power to modify, vary or end any automatic stay (as it would have with a discretionary stay).

**Question 3**: When should the automatic moratorium commence and terminate? Are complementary measures (for example, further requirements to notify creditors) necessary to support its commencement?

17. If a broader automatic stay were to be introduced, it is suggested that it should commence at the election of the scheme proponent (rather than be automatic on disclosure or filing of an application under section 411(1) of the Act), but initially be of quite short duration (perhaps 20 business days), and then subject to extension or termination at the discretion of the Court and on any terms or conditions that the Court considers appropriate.[8] Such an election could be made by lodging a process with the

[8] In considering whether to grant an extension, the Court could be required to consider whether the continuation of the moratorium is generally in the interests of the company's creditors. Section 440A of the Act may provide an appropriate model for such a test.

Court leading to a hearing within the initial period and/or by lodging an appropriate form with the Australian Securities and Investments Commission (**ASIC**) indicating an intention to propose a creditors' scheme of arrangement which would then appear on an ASIC search.[9]

18. As the moratorium will automatically apply, a notice to affected creditors should be given by the scheme proponent at the time of commencement of the moratorium.

19. Any automatic moratorium should end at the expiry of the initial 20 business day period, or such longer period if ordered by the Court.

20. An alternative model could be an initial automatic moratorium commencing at the same time as the protection under s 415D, but with a more limited duration, and the matter to be reviewed within the initial 20 business day period. The stay on enforcing rights under s 415D commences:

    - if the company is a disclosing company, when the announcement is made; or
    - otherwise, when the application under s 411 is made by the company.

**Question 4**: How long should the automatic moratorium last? Should its continued application be reviewed by the Court at each hearing?

21. See the responses to questions 1 to 3 above. The Court should decide the period of the moratorium and when it should be reviewed, though any affected creditor should have the ability to apply to modify or end the moratorium.

**Question 5**: Are additional protections against liability for insolvent trading required to support any automatic moratorium?

22. The existing safe harbour protection in s 588GA provides a defence for a director against liability for insolvent trading where the requirements of that provision are made out. This provision can be relied upon by the directors of a company proposing a scheme of arrangement. This is viewed as an appropriate defence in the context of formulating and proposing a creditors' scheme of arrangement.

23. However, the adequacy of this protection in this context should be considered as part of the independent review of the safe harbour protections foreshadowed in the consultation paper. There may be some benefit in a specific provision making it clear that the safe harbour applies to debts incurred whilst the company is proposing a creditors' scheme of arrangement.

**Question 6**: What, if any, additional safeguards should be introduced to protect creditors who extend credit to the Company during the automatic moratorium period?

24. If there is to be an automatic moratorium affecting creditors who extend credit to the company during the automatic moratorium period, then those creditors should be notified of the automatic moratorium. Doing so would let creditors know that they may be prevented from enforcing rights or commencing proceedings (as the case may be) against the company. Creditors can then make their own commercial judgment whether or not to trade or continue trading with the company. Creditors who continue to supply

[9] This assumes electronic lodgement and that the notice is available on an ASIC search contemporaneously with its lodgement.

with knowledge of the moratorium could negotiate commercial terms they consider appropriate.

25. That said, an exception like that provided for the United Kingdom may be sensible. The automatic moratorium in the United Kingdom will end where the company is unable to pay moratorium debt (i.e. debts incurred during the moratorium).[10]

26. It is also noted the directors will remain subject to their statutory duties including under ss 180 and 181 of the Act and their general law duties.

**Question 7**: Should the insolvency practitioners assisting the Company with the scheme of arrangement be permitted to act as the Voluntary Administrators of the Company on scheme failure?

27. This is not the occasion to revisit the current regime which governs when registered liquidators may act as voluntary administrators, and in particular the existing statutory disqualification regime contained in s 448C of the Act, or the declarations that should be made under s 436DA of the Act.

**Question 8**: Is the current threshold for creditor approval of a scheme appropriate? If not, what would be an appropriate threshold?

28. It is considered that the current voting threshold remains appropriate for schemes of arrangement.

29. The scheme of arrangement process derives from the *Joint Stock Companies Arrangement Act 1870* (UK). Even then, the voting threshold was a majority in number of creditors whose debts or claims against the company amount in the aggregate to at least 75% of the total amount of the debts and claims of the creditors present and voting. It is assumed this voting threshold was selected to align with the threshold for company shareholders to pass a special resolution, which is that the resolution is passed by at least 75% of the votes cast by shareholders entitled to vote on the resolution.

30. It is noted the voting threshold for the newly introduced restructuring plan under Part 26A of the *Companies Act 2006* (UK), which is a process similar to schemes of arrangement, is a 75% majority of each voting class only. There is no headcount test for that process. That is also the same voting threshold for the United Kingdom's company voluntary arrangement (CVA) process, also requiring a positive vote by at least 75% by value of creditors who vote on the proposal.[11]

31. Hence, it appears a 75% value threshold remains a consistent and more recognised threshold in the context of schemes of arrangement.

32. Practical experience does not suggest there is a reason to change the current "head count" threshold requiring a majority in number of the relevant creditors to agree to the proposed scheme or that this requirement is generally impeding the use of schemes of arrangement. However, there is a concern that the headcount majority may be manipulated by assigning small portions of debt to other persons or companies so as to

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[10] In the United Kingdom, any moratorium must be ended by the monitor if certain pre-moratorium and moratorium debts are not paid. See Annexure A at section 7.

[11] There is a further condition that no more than 50% (by value) of any creditors who vote against the proposal (or a modification of it) are creditors who are unconnected with the company.

frustrate the obtaining of a majority. This concern can be met by amending s 411(4)(a)(i) so that it grants a similar discretion to the Court to dispense with the headcount test as appears with members' schemes of arrangement in s 411(4)(a)(ii)(A).

**Question 9**: Should rescue, or 'debtor-in-possession', finance be considered in the Australian creditors' scheme context?

33. Practical experience suggests that in most cases the finance market, and particularly existing financiers, will often provide "debtor-in-possession" financing (or consent to such financing) where that is required by the company when pursuing a scheme of arrangement, particularly where the proposal has significant support amongst those lenders. Often one or more of the company's existing lenders are well placed to consider agreeing to fund the company during its restructuring process.

34. That said, it is noted that Singapore has introduced a formal "debtor-in-possession" financing protection. Section 67 of the *Insolvency, Restructuring and Dissolution Act 2018* (Singapore) provides that, in general terms, upon the company making an application for orders to convene a scheme meeting, or seeking a moratorium, the Court can make orders to the effect that debt arising from rescue financing has priority over other debts, and that any security interest securing that rescue financing has priority.

35. The United Kingdom has not introduced an explicit "debtor-in-possession" or "rescue financing" process. However, a company under a Part A1 moratorium can incur "moratorium debts", which may be secured provided the monitor consents, taking complete priority over other liabilities (other than those secured by fixed charge security) if the company goes into liquidation or administration within 12 weeks after the end of the moratorium.

36. Some of the Committee consider that "debtor-in-possession" or rescue financing is a matter best addressed by the finance market and that a statutory mechanism for "debtor-in-possession" financing in Australia in relation to schemes of arrangement is not necessary. Others consider there to be some merit in aligning our regime with the development in other jurisdictions such as Singapore and providing for "debtor-in-possession" financing, with a "super priority" option. Although, it is noted that Singapore's laws on this issue have adopted concepts from the US Bankruptcy Code that have been given divergent meaning in the US courts (such as "indubitable equivalence" when referring to the adequate protection of security interests).[12] If any "debtor-in-possession" financing regime were to be introduced as a statutory provision, caution should be taken to avoid replicating any provisions from foreign laws that may not have certain application.

**Question 10**: What other issues should be considered to improve creditors' schemes?

37. Consideration should be given to an improvement in the form of "cross-class cram down" requiring Court approval. This would be on the basis that a class of creditors, which has not approved the proposed scheme of arrangement by the appropriate majority, could be bound by a proposed scheme (which has been approved by another class of creditors) where the outcome for the members of that class is objectively determined to be no worse than their position in the absence of the proposed scheme.

[12] Cf. George W. Kuney, 'Hijacking Chapter 11' (2004) 21(19) *Emory Bankruptcy Developments Journal* at section II, A, "*DIP Financing Under § 364 of the Bankruptcy Code*".

The recent reforms introduced in Part 26A of the *Companies Act 2006* (UK) could be drawn upon. Using the United Kingdom's restructuring plan, cross-class cram down is permitted if the following two conditions are satisfied:[13]

- none of the dissenting class would be worse off (if the plan is imposed on them) than they would be in the event of a relevant alternative (being, whatever the Court considers would be most likely to occur if the compromise or arrangement is not sanctioned); and

- agreement to the compromise or arrangement by at least 75% in value of a class of creditors or (as the case may be) of members, present and voting at the meeting who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative.

38. There would also be merit in considering (whether part of a cross-class cram down feature or otherwise) an appropriate mechanism for dealing with "out of the money" shareholders to facilitate a restructuring through a creditors' scheme of arrangement, such as giving the Court, when approving a creditors' scheme of arrangement, power to transfer (or cancel) shares in the scheme company in a way analogous to s 444GA in the case of deeds of company arrangement.

39. Some other practical improvements suggested for consideration are:

- removing s 411(11) which requires a copy of the approval order to be annexed to the constitution of the scheme company – this provision is invariably dispensed with by order under s 411(12) (both in creditors' and members' schemes) when the scheme is approved, and in any event the order is lodged with ASIC and any amendment to the constitution of a scheme company contemplated by a scheme requires separate compliance with the requirements of the Act covering constitutional amendments;

- reviewing the need for a ROCAP[14] (RATA[15]) and other certified financial statements as required by Schedule 8, ss 8202 and 8203 of the Corporations Regulations – these may not be appropriate for all creditors' schemes having regard to the extent of information which might be contained in such documents and whether that should be disclosed to the relevant creditors in an appropriate form in or with the explanatory statement;

- reviewing the requirement in Schedule 8, s 8201(b) of the Corporations Regulations that the explanatory statement must set out, if a composition of debts is proposed, the expected dividend that would be paid to scheme creditors if the scheme were put into effect as proposed, as it may not be appropriate in all cases and an implied value analysis might be preferrable in certain situations;[16] and

- inserting a specific set of meeting provisions that apply to schemes of arrangement. The current Court rules import the Insolvency Practice Rules which are usually modified by the Court when applied to a scheme meeting

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[13] *Companies Act 2006* (UK) s 901G.
[14] Report on Company Activities and Property
[15] Report as to Affairs
[16] See *Re Boart Longyear Ltd* [2017] NSWSC 567 at [17].

for a creditors' scheme and more appropriate provisions would streamline the orders made at the first Court hearing.

**Question 11**: Are there any other potential impacts that should be considered, for example on particular parties or programs? If so, are additional safeguards required in response to those impacts?

40. It may be considered whether it would be desirable to include provisions to facilitate the restructure of registered managed investment schemes so that the statutory scheme of arrangement procedure could be used to implement an arrangement between the responsible entity (or former responsible entity) and the members of the managed investment scheme.

41. Consideration should be given to whether any automatic moratorium affects rights in connection with market netting and close out netting under the *Payment Systems and Netting Act 1998* (Cth), and also rights under the Cape Town Convention,[17] and whether such rights should be specifically excluded.

[17] *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) referring to the Convention on International Interests in Mobile Equipment, done at Cape Town on 16 November 2001, as amended and in force for Australia from time to time.

# Annexure A

## 1. What are schemes of arrangement?

In Australia, schemes of arrangement are governed by Part 5.1 of Chapter 5 of the *Corporations Act 2001* (Cth) (**Act**) and in particular s 411 of the Act. A scheme of arrangement is a statutory procedure which permits a company to make an arrangement or compromise with its members or creditors or a class of them which, if approved by the requisite majorities of such members or creditors and sanctioned by the Court, will be binding on all of them, whether they voted in favour of it or not.

A scheme of arrangement is not a new legal concept, having been used since the *Joint Stock Companies Arrangement Act 1870* (UK) for a variety of purposes, including in more recent times as a mechanism to implement a financial restructuring, particularly where an arrangement or compromise is proposed with a one or more classes of secured creditors.

The key requirements under s 411(1) to propose a scheme are that:

(a) A "Part 5.1 body" proposes the scheme. This is a company or a registrable body that is registered under Division 1 or 2 of Part 5B.2 of the Act.[18] This means that only an Australian company or foreign company registered in Australia may propose a scheme.

(b) A "compromise" or "arrangement" is proposed by the company between its creditors or members or any class of them. These terms have been interpreted widely by the Courts in Australia and the United Kingdom, and will be given a liberal construction.[19] In *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co*,[20] North J said at 228:

> *The section speaks of a "compromise or arrangement." What is a compromise? An arrangement between two parties by which they both make concessions and give up something.*

Putting forward a compromise signifies the existence of some existing controversy or some difficulty in the enforcement of rights as between the parties.[21] Whereas the word arrangement has been found to have a wider meaning than compromise.[22] An arrangement is a transaction that simply involves some "give and take" or the provision of some benefit.[23]

The liberal interpretation of the terms "compromise" and "arrangement" give the proponent extensive flexibility when designing the terms of the scheme. Therefore, schemes can include the reduction or release of debt, but may also result in more creative outcomes such as the amendment of documents, exchange of rights for shares, extension of lending terms or a combination of such proposals. It is important to bear in mind that a creditors' scheme of

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[18] *Corporations Act 2001* (Cth) s 9.
[19] *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485; 112 ALR 627 at 501.
[20] *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213.
[21] *Mercantile Investment & General Trust Co v International Co of Mexico* [1893] 1 Ch 484 at 491.
[22] *Re International Harvester Co of Australia Pty Ltd* [1953] VLR 669 at 672.
[23] *Re Opes Prime Stockbroking Ltd (No 2)* (2009) 179 FCR 20; 258 ALR 362; [2009] FCA 813 at [29] – [31].

arrangement can also be usefully engaged where the company is seeking to make an arrangement to address commercial circumstances other than its financial distress (e.g. schemes with option holders).

(c) The scheme must be proposed between the company and its creditors or members, or any class of them. The term "creditors" is not defined in the Act for the purpose of s 411. The Courts have found that it includes all persons with debts or claims provable in the liquidation of the company,[24] both secured and unsecured creditors, persons with claims to unliquidated damages which are prima facie maintainable,[25] contingent creditors,[26] and even holders of options to take up shares at a future date.[27]

Where those essential elements can be satisfied, the proponent of the scheme may apply to the Court seeking orders to convene a meeting of the creditors, or class of them, with whom the scheme is being proposed to consider and vote on the scheme. Whilst a scheme of arrangement may be proposed between a company and its members, these submissions focus on compromises or arrangements proposed between a company and its creditors in view of the questions raised in the consultation paper.

A critical part of the scheme process is the explanatory statement to the scheme. This is a document that must be provided with every notice of the meeting that is sent to a creditor or member. The explanatory statement must:

(a) explain the effect of the compromise or arrangement and, in particular, stating any material interests of the directors, whether as directors, as members or creditors of the body or otherwise, and the effect on those interests of the compromise or arrangement in so far as that effect is different from the effect on the like interests of other persons; and

(b) set out such information as is prescribed and any other information that is material to the making of a decision by a creditor or member whether or not to agree to the compromise or arrangement, being information that is within the knowledge of the directors and has not previously been disclosed to the creditors or members.[28]

The Australian Securities and Investments Commission (**ASIC**) must also be given a reasonable opportunity to examine the terms of the proposed compromise or arrangement and a draft explanatory statement relating to the proposed compromise or arrangement before the Court will make orders to convene a meeting of creditors or members.

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[24] *Re Glendale Land Development Ltd (in liq)* [1982] 2 NSWLR 563; (1982) 7 ACLR 171; 1 ACLC 562.
[25] *Petrochemical Industries Ltd (in liq) v Dempster Nominees Pty Ltd* (1994) 15 ACSR 468; 13 ACLC 103.
[26] *Re Boart Longyear Ltd* (2017) 121 ACSR 328; [2017] NSWSC 567 at [29], upheld on appeal *First Pacific Advisors LLC v Boart Longyear Ltd* [2017] 121 ACSR 136; [2017] NSWCA 116.
[27] *Re US Masters Ltd* (1991) 4 ACSR 462.
[28] *Corporations Act 2001* (Cth) s 411(3) (draft explanatory statement) and s 412 (explanatory statement with notice of meeting) and as to prescribed information, Schedule 8 of the *Corporations Regulations 2001* (Cth).

The role of the Court at the first hearing is principally to determine, in the exercise of its discretion, whether to order the convening of the meeting and approve the explanatory statement to the scheme, if it is satisfied of the following matters:[29]

(a) the plaintiff is a "Part 5.1 body";

(b) the proposed scheme is an "arrangement" [or "compromise"] within the meaning of s 411;

(c) there has been proper disclosure to members (or creditors if a creditors' scheme);

(d) the scheme is bona fide and properly proposed;

(e) ASIC has had reasonable opportunity to examine the proposed scheme and explanatory statement, to make submissions and has had 14 days' notice of the proposed hearing date of the first Court hearing (that is, s 411(2));

(f) the procedural requirements of the relevant Court's corporation rules have been met;[30] and

(g) there is no apparent reason why the scheme should not, in due course, receive the Court's approval if the necessary majority of votes is achieved.

The Court will not ordinarily summon a meeting at the first Court hearing unless the scheme is of such a nature and cast in such terms that, if it receives the statutory majority at the meeting, the Court would be likely to approve it on the hearing of a petition which is unopposed.[31]

If the Court orders the meeting of creditors or members, those creditors or members decide whether or not to agree to the proposed scheme.

In the case of a scheme proposed with creditors, the compromise or arrangement must be agreed to by a majority in number of the creditors, or of the creditors included in that class of creditors, present and voting, either in person or by proxy, being a majority whose debts or claims against the company amount in the aggregate to at least 75% of the total amount of the debts and claims of the creditors present and voting in person or by proxy, or of the creditors included in that class present and voting in person or by proxy (the **Requisite Majority**).[32] Importantly, a scheme of arrangement that obtains the necessary majority vote of creditors and Court approval can bind creditors who vote against the scheme.

In the case of a single compromise or arrangement which involves separate classes of creditors, each class of creditors must agree to the proposed compromise or

[29] *Re Ellerston Global Investments Ltd* [2020] NSWSC 879 at [25]; referred to in *Re Vocus Group Limited* [2021] NSWSC 630 at [12]. See also *F T Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* (1977) 3 ACLR 69 at 72.
[30] In New South Wales these are the *Supreme Court (Corporations) Rules 1999* (NSW).
[31] *Re Ellerston Global Investments Ltd* [2020] NSWSC 879 at [26]; *F T Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* (1977) 3 ACLR 69 at 72, approved in *Australian Securities Commissions v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 504.
[32] *Corporations Act 2001* (Cth) s 411(4).

arrangement by the Requisite Majority otherwise the Court cannot make orders approving the compromise or arrangement.[33]

Where the requisite majority of creditors (or members) agree to the proposed scheme, the proponent may then seek orders from the Court to approve the scheme of arrangement.

At the second Court hearing, the Court has the discretion to approve a scheme of arrangement and is not bound to approve it merely because it has made orders for the convening of meetings or because the statutory majorities have been achieved.[34] The Court must be satisfied that the arrangement is fair and reasonable and that the creditors have voted in good faith and for proper purposes; however, the Court will approach the task of approving the scheme on the basis that properly informed creditors are better judges of what is in their own commercial interest than the Court and will give substantial weight to their views.[35] The Court will also have regard to whether the proposed arrangement is contrary to public policy.[36] Matters relevant for the Court to consider when determining whether to approve a scheme include:[37]

(a) whether the orders of the Court convening the scheme meeting were complied with;

(b) whether the resolution to approve the scheme was passed by the requisite majority and whether other statutory requirements have been satisfied;

(c) whether all conditions to which the scheme is subject (other than Court approval and lodgement of the Court's orders with ASIC) have been met or waived;

(d) whether the scheme is fair and reasonable so that an intelligent and honest member of the relevant class, properly informed and acting alone, might approve it;

(e) whether the proponent has brought to the attention of the Court all matters that could be considered relevant to the exercise of the Court's discretion;

(f) whether there was full and fair disclosure to creditors of all information material to the decision whether to vote for or against the scheme;

(g) whether the scheme of arrangement has a compulsive or oppressive effect upon minority shareholders and creditors; and

(h) whether the interests of other groups who are not parties to, but are affected by the scheme are dealt with appropriately.

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[33] *Re Mutual Home Loans Fund of Australia Ltd* [1979] 2 NSWLR 312; (1979) 4 ACLR 571.
[34] *Re Atlas Iron Ltd (No 2)* [2016] FCA 481 at [5].
[35] *Re BIS Finance Pty Ltd* [2018] NSWSC 3 at [10]; *Re Boart Longyear Limited (No 2)* [2017] NSWSC 1105 at [61].
[36] *Re Boart Longyear Limited (No 2)* [2017] NSWSC 1105 at [61].
[37] *Re Atlas Iron Ltd (No 2)* [2016] FCA 481 at [6]; *Re BIS Finance Pty Ltd* [2018] NSWSC 3 at [10].

If approved by the Court and the Court's orders are lodged with ASIC, the compromise or arrangement becomes binding on the creditors or members, or class of them.[38]

## 2. Some advantages of schemes in debt restructuring

The advantages of using a creditors' scheme of arrangement commonly cited include:

(a) (**Not a form of external administration**) A scheme of arrangement is not an insolvency process. A compromise or arrangement can be proposed by company that is solvent, a financially distressed or near insolvent company, or a company that is insolvent or even in liquidation. A scheme of arrangement is a process which can allow the company to remain in the control of its directors, unlike voluntary administration.

(b) (**Scheme administrator not always required**) Not all schemes of arrangement require a scheme administrator. For example, where a compromise or arrangement effects amendments to secured lending arrangements such as the repayment amounts or maturity date, it is not necessary to appoint a scheme administrator to administer the scheme.

(c) (**Flexible terms**) As mentioned above, the terms "compromise" and "arrangement" have both been interpreted widely by the Courts. This means there is considerable flexibility in what can be proposed to creditors. Terms included in schemes approved recently have included:

(i) amend and extend existing financial arrangements;[39]

(ii) undertake a debt for equity swap or debt for asset swap;[40]

(iii) transfer obligations to a new company;[41] and

(iv) restructure stapled securities.[42]

(d) (**Binds a non-consenting minority**) A scheme will bind all creditors in the class to whom it applies, including creditors who did not vote in favour of the scheme. This is helpful as, assuming the Requisite Majority can be achieved, a scheme has the ability to prevent minority creditors from blocking the debt restructuring process. This can be particularly powerful where the syndicated lending documentation requires unanimous lender approval to amend terms or release debt. The scheme process allows the majority of lenders to agree

[38] *Corporations Act 2001* (Cth) ss 411(4) and (10).
[39] *Re Wiggins Island Coal Export Terminal Pty Ltd* [2018] NSWSC 1434; *Re Wiggins Island Coal Export Terminal Pty Ltd* [2019] NSWSC 831.
[40] *Re Nine Entertainment Group Limited (No 1)* [2012] FCA 1464; *Re Nine Entertainment Group Ltd (No 2)* [2013] FCA 40; *Re Atlas Iron Ltd* [2016] FCA 366; *Re Boart Longyear Limited (No 2)* [2017] NSWSC 1105.
[41] *Re Nine Entertainment Group Limited (No 1)* [2012] FCA 1464; *Re Ovato Print Pty Ltd* [2020] NSWSC 1683.
[42] *Re Centro Properties Ltd* [2011] NSWSC 1465.

to a deal binding on any dissenting lenders, assuming the Requisite Majority can be achieved.[43]

(e) (**Can bind secured creditors in relation to their secured rights**) A scheme has the power to bind secured creditors who did not vote in favour of it. Raising the possibility of a scheme may therefore encourage secured creditors to achieve a consensual agreement, which may not otherwise have been possible. This can be compared against using a Deed of Company Arrangement following a voluntary administration process which will not bind secured creditors unless they vote in favour of it at the creditors' meeting.

(f) (**Power to bind a specific class of creditors**) A compromise or arrangement can be proposed with a specifically drawn class of creditors. For example, a company may want to propose a scheme with a specific group of secured lenders or trade creditors who will vote together, subject to the Court not ordering separate classes of creditors. This can be compared against proposing a Deed of Company Arrangement which may be voted on by all creditors of the company.

(g) (**Third party compromises and releases**) A scheme of arrangement can be used to bind creditors to give releases to third parties (i.e. releases given to people other than the company proposing the scheme). To do so there must be:

(i) a sufficient nexus between a release by the creditors of the claims against the third party and the relationship between the creditors and the company proposing the scheme; and

(ii) some element of give and take, such that the creditors receive something in return for the benefit conferred on the third parties.[44]

This is again another advantage compared to a Deed of Company Arrangement which cannot extinguish rights of creditors against third parties.[45]

## 3. The Harmer Report and some disadvantages of schemes in debt restructuring

A cited disadvantage of the scheme of arrangement process is that it can be an expensive and time-consuming exercise for the company proposing the scheme, particularly having regard for the need for Court orders convening the meeting of creditors and also the requirement that the Court approve the scheme.

In the Australian Law Reform Commission Report 45, General Insolvency Inquiry, dated 13 December 1988 (the **Harmer Report**), at paragraph 46 it was remarked that "*[t]he procedure for a scheme of arrangement is cumbersome, slow and costly and is particularly unsuited to the average private company which is in financial difficulties. The time taken to implement a scheme varies but in general is at least*

[43] *Re Wiggins Island Coal Export Terminal Pty Ltd* [2018] NSWSC 1434 is an example of where this occurred.
[44] *Fowler v Lindholm* (2009) 178 FCR 563; *Trust Company (Nominees) Ltd v Angas Securities Ltd (No 5)* (2019) 135 ACSR 398 at [58].
[45] *Lehman Brothers Holdings Inc v City of Swan* [2010] HCA 11.

*two to three months. The legal and accountancy costs of even a relatively straightforward scheme are substantial. Despite time and cost, the procedure, if the proposed scheme is rejected by creditors or not approved by the Court, will not, of itself, result in an alternative form of insolvency administration, such as a winding up.*"

After reviewing of the existing voluntary procedures in place at the time, including schemes of arrangement, the Harmer Report recommended, at paragraph 51, the "*introduction of a new voluntary procedure for insolvent companies which integrated the procedures for the voluntary winding up of a company and for a scheme of arrangement. The procedure proposed was designed with the aim that it would be:*

(a) *capable of swift implementation;*

(b) *as uncomplicated and inexpensive as possible; and*

(c) *flexible, providing alternative forms of dealing with the financial affairs of the company."*

The outcome of this recommendation was the voluntary administration regime set out in Part 5.3A of the Act.

The Harmer Report further recommended at paragraph 57 that "*schemes of arrangement should be preserved for, in particular, larger private or public companies (although it is not suggested that this procedure should be limited to such companies).*"

## 4. Some examples of uses of creditors' schemes of arrangement in Australia

Some examples of how creditors' schemes of arrangement have been used in the "post voluntary administration period" are the following:

(a) (**Arrangements within liquidations**) The scheme of arrangement procedure has been used to conduct large liquidations more efficiently. This was done in the *HIH group* liquidations where a "run off" scheme was proposed for the ascertainment and payment of liabilities in a way considered by the liquidator to be more expeditious and efficient than would occur through the ordinary winding up process.[46]

(b) (**Arrangements with secured creditors**) The scheme process has been used in a number of situations to effect arrangements between a company and one or more classes of its secured creditors.

Often, this involves a financially distressed or over leveraged borrower who wishes to reduce its overall debt burden by swapping part of its debt for equity and amending the terms of its remaining secured debt, so as to make the

[46] See *Re HIH Casualty & General Insurance Ltd* (2005) 215 ALR 562 and *Re HIH Casualty and General Insurance Ltd* (2005) 56 ACSR 295. A similar approach has been taken in a number of English scheme cases involving insurance companies no longer writing business (see the cases cited at [6] in *Re HIH Casualty & General Insurance Ltd* (2005) 215 ALR 562). See also *Re Bell Group Finance Pty Ltd (in liq); Ex parte Bell Group Finance Pty Ltd (in liq)* [2020] WASC 287; *Bell Group Finance Pty Ltd (In Liq); Ex Parte Bell Group Finance Pty Ltd (In Liq) [No 2], Re* [2020] WASC 323.

company financially viable. Examples of this include the schemes proposed in the *Channel 9*,[47] *Boart Longyear*,[48] and *BIS Finance*[49] cases.

In other cases, the scheme of arrangement process has been used by a borrower to effect the extension of an impending maturity date for secured facilities or other debt and new repayment terms to avoid default. Examples of this include the schemes proposed in the *WIECT* cases.[50]

## 5. Section 411(16) discretionary moratorium

Pursuant to s 411(16), where a company has proposed a compromise or arrangement, the Court may restrain further proceedings in any action or other civil proceeding against the company, except by leave of the Court and subject to such terms as the Court imposes. This application can be made by the company, or any of its members or creditors. The purpose of s 411(16), and an order made pursuant to it, is to protect the assets of the company pending the possible adoption of the scheme.[51] As was observed in *Re GAE Pty Ltd*,[52] once it becomes known or suspected among creditors that a compromise or scheme of arrangement is to be proposed, there is a risk of some creditors rushing in, in an attempt to obtain a preference.

A threshold element of s 411(16) is that the company has "proposed" the compromise or arrangement. The proposal must be known publicly, or at least to one or more of the creditors who would be affected. It is not necessary to have the scheme in a complete form. There must, however, be at least a scheme, the general principles of which have been defined, and which, is at a stage at which the Court would be justified in ordering a meeting of creditors.[53]

The scope of the protection which may be afforded under s 411(16) is the restraint of "further proceedings in any action or other civil proceedings against the body except by leave of the Court and subject to such terms as the Court imposes". In *Re Glencore Nickel Pty Ltd*,[54] McClure J held that the expression "further proceedings" meant any proceedings other than the scheme proceedings, whether commenced or not. This was followed in the decision of *Re Boart Longyear Limited* where Black J adopted this interpretation stating:[55]

> "…*I would adopt the wider view of the scope of the section and, on that basis, to the extent that an order is made, it should properly expressly extend to any action or civil proceedings against the Plaintiffs, whether or not such action or proceeding has already been commenced.*"

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[47] *Re Nine Entertainment Group Limited (No 1)* [2012] FCA 1464; *Re Nine Entertainment Group Ltd (No 2)* [2013] FCA 40.
[48] *Re Boart Longyear Limited (No 2)* [2017] NSWSC 1105.
[49] *Re BIS Finance Pty Ltd* [2018] NSWSC 3.
[50] *Re Wiggins Island Coal Export Terminal Pty Ltd* [2018] NSWSC 1342 and *Re Wiggins Island Coal Export Terminal Pty Ltd* [2019] NSWSC 831.
[51] *Re Boart Longyear Ltd* (2017) 121 ACSR 377 at [12] citing *Re GAE Pty Ltd* [1962] VR 252 at 256; *Playcorp Pty Ltd v Venture Stores (Retailers) Pty Ltd* (1992) 7 ACSR 193.
[52] *Re GAE Pty Ltd* [1962] VR 252 at 256.
[53] *Re GAE Pty Ltd* [1962] VR 252 at 255 to 256.
[54] *Re Glencore Nickel Pty Ltd* [2003] WASC 18 at [67].
[55] *Re Boart Longyear Limited* [2017] NSWSC 537 at [11].

In *Re Reid Murray Acceptance Ltd*,[56] which considered a predecessor to s 411,[57] Adam J held that "proceedings" includes extra-judicial proceedings such as the proposed appointment of a receiver under a security.[58] However, the form of legislation considered in that case did not include reference to "other civil" proceedings, and it has been suggested that there is doubt as to whether the protection that maybe afforded under s 411(16) extends to extra-judicial proceedings, such as the enforcement of security by the appointment of a receiver.[59]

## 6. Sections 415D and 415F stay on enforcing rights

Section 415D(1) of the Act provides that a right that arises for any reason by express provision of a contract cannot be enforced against a company for:

(a) the reason that the company, if it is a disclosing entity, has publicly announced that it will be making an application under section 411 for the purpose of avoiding being wound up in insolvency;

(b) the reason that the company is the subject of an application under s 411;

(c) the reason that the company is the subject of a compromise or arrangement approved under Part 5.1 as a result of an application under s 411;

(d) the company's financial position, if the company is the subject of such an announcement, application, compromise or arrangement;

(e) a reason that, in substance, is contrary to that subsection.

Section 415D(1)(e) also provides that the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**) may prescribe other reasons, but no additional reasons have been prescribed to date.

There are a number of exceptions to the stay of rights listed in the Corporations Regulations[60] and under a Ministerial declaration.[61] These exceptions presumably reflect types of contractual arrangements, and certain types of rights, which as a matter of policy should be excluded from the automatic stay arising under s 415D. Notably this includes the right of a person with security over the whole or substantially the whole of the proposing company's property.[62]

The stay under s 415D starts:

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[56] *Re Reid Murray Acceptance Ltd* [1964] VR 82.

[57] The predecessor was in s 181(9) of the *Companies Act 1961* (NSW), which provided "*[w]here no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of such creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the Court imposes*".

[58] Adam J also held that "further proceedings" meant only proceedings which had already been commenced. This view was subsequently expressly rejected by McClure J in *Re Glencore Nickel Pty Ltd* [2003] WASC 18.

[59] See the discussion in O'Donovan, J, '*Company Receivers and Administrators*', Thomson Reuters at [60.4120].

[60] See *Corporations Regulations 2001* (Cth) r 5.3A.50.

[61] See *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (Cth).

[62] *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (Cth) s 6.

- if the company is a disclosing company, when the announcement is made; or
- otherwise, when the application under s 411 is made by the company.[63]

The stay under s 415D ends:

- if the company is a disclosing company and an announcement is made, three months after the announcement was made if the s 411 application has not been made within that period (or a longer period if ordered by the Court);[64]
- when the application under s 411 is withdrawn or when the Court dismisses the application;
- at the end of any compromise or arrangement approved by the Court;
- if the compromise or arrangement ends due to a resolution or order for the company to be bound up, when the company's affidavits have been fully wound up.

Under s 415F, the Court may also order that one or more rights under a contract are enforceable against a company only with leave of the Court and in accordance with any terms made by the Court. The Court may only make the order under s 415F where certain conditions are met, including that the public announcement mentioned above has been made, the s 411 application has been made, or the company is subject to an approved compromise or arrangement. The Court determines how long a stay under s 415F should last having regard to, among other things, the interests of justice.

## 7. Mortarium in the United Kingdom when proposing schemes of arrangement

The United Kingdom recently introduced a new moratorium process, known as a Part A1 moratorium. A Part A1 moratorium is an insolvency process that was introduced by the *Corporate Insolvency and Governance Act 2020* (**CIGA 2020**), effective from 26 June 2020. The Part A1 moratorium is not built into the scheme of arrangement or restructuring plan processes used in the United Kingdom. It is a standalone procedure, rather than part of a scheme of arrangement process as such.

Broadly speaking, a company is eligible to use the standalone moratorium where:

(a) the company is incorporated under the *Companies Act 2006* (UK) or they are unregistered but may be wound up under the *Insolvency Act 1986* (UK), and certain overseas companies;[65]

[63] *Corporations Act 2001* (Cth) s 415D(2)(a).
[64] *Corporations Act 2001* (Cth) s 415D(3) allows the Court to order a longer period than the 3 months if satisfied that the longer period is appropriate having regard to the interests of justice.
[65] *Insolvency Act 1986* (UK) s A54.

(b) the directors state that the company is, or is likely to become, unable to pay its debts;[66] and

(c) an insolvency practitioner acting as proposed monitor is of the view that it is likely a moratorium would result in the rescue of the company as a going concern.[67]

The monitor is an insolvency practitioner, who will be an officer of the Court, overseeing the company's affairs during the moratorium.[68] His or her job is to monitor the operation of the moratorium and continue to consider whether it remains likely that the moratorium will result in the rescue of the company as a going concern.[69] In the event the monitor considers no recuse of the company is possible, then the moratorium must end.[70]

A company enters the standalone moratorium in two ways:

(a) by the directors filing relevant documents at Court (the out-of-court process).[71] The out-of-court process will usually only be available to a company if it is not subject to an outstanding winding up petition and is not an overseas company.

(b) by the directors making an application to Court (the in-court process).[72] This will ordinarily be available where there is an outstanding winding up petition or the company is an overseas company.

The moratorium will give companies protection for 20 business days.[73] The protection can be extended for a further 20 business days without consent,[74] or longer with consent of the pre-moratorium creditors or by Court order.[75] It can also be terminated early, such as where the monitor considers that the moratorium is no longer likely to result in the rescue of the company as a going concern, the objective of rescuing the company as a going concern has been reached or the company enters into an insolvency process.[76]

The moratorium will restrict creditors and shareholders from commencing an insolvency process like liquidation and administration.[77] Other restrictions will also apply, like landlords being unable to forfeit without Court permission, security cannot be enforced without Court permission (other than certain financial collateral) and legal processes against the company cannot start or continue without Court permission.[78]

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[66] *Insolvency Act 1986* (UK) s A6(1)(d).
[67] *Insolvency Act 1986* (UK) s A6(1)(e).
[68] See *Insolvency Act 1986* (UK) ss A34 and A54(1).
[69] *Insolvency Act 1986* (UK) s A35.
[70] *Insolvency Act 1986* (UK) s A38.
[71] *Insolvency Act 1986* (UK) s A3.
[72] *Insolvency Act 1986* (UK) s A4.
[73] *Insolvency Act 1986* (UK) s A9(2).
[74] *Insolvency Act 1986* (UK) s A10.
[75] *Insolvency Act 1986* (UK) ss A11 and A13.
[76] *Insolvency Act 1986* (UK) ss A38 and A16.
[77] *Insolvency Act 1986* (UK) ss A20 and A24.
[78] *Insolvency Act 1986* (UK) s A21.

However, the moratorium will not apply to certain "pre-moratorium debt" and "moratorium debts". Any moratorium must be ended by the monitor if certain pre-moratorium and moratorium debts are not paid.[79] The pre-moratorium debts include, among other specified exclusions, goods or services supplied during the moratorium, rent in respect of a period during the moratorium and employee wages.[80] The moratorium debts are those debts falling due during the moratorium because of an obligation incurred during the moratorium.[81] There is also no restriction on financial creditors from accelerating the debt owing to them during the moratorium.

## 8. Mortarium in Singapore when proposing schemes of arrangement

The *Insolvency, Restructuring and Dissolution Act 2018* (Singapore) (**IRDA**) provides that where a company proposes, or intends to propose, a scheme of arrangement, the Court may grant a moratorium order.[82]

The ability for a company to seek a moratorium when it merely *intends* to propose a scheme of arrangement was introduced following the Report of the Insolvency Law Review Committee dated 2013 which commented at page 142 to 143 that *"[t]he Committee is of the view that this requirement that a scheme must have been "proposed" before a moratorium can be granted may in some instances be counterproductive: in some cases, the moratorium is needed precisely because the company needs time to work out a scheme to propose to its creditors. The Committee therefore recommends that the court should have the power to grant a statutory moratorium where there is an intention to propose a scheme of arrangement, subject to such terms as the court sees fit to impose."*

An automatic 30 day moratorium also starts from the date the application for the moratorium is made.[83]

To obtain the moratorium order, the company must provide the Court with specific information in support of the application, including evidence of support from the company's creditors for the scheme of arrangement and an explanation of how such support would be important for the success of the scheme.[84]

The company must also publish notice of the moratorium application in the Gazette and at least one English newspaper, and give notice of the application to each creditor meant to be bound by the intended or proposed compromise or arrangement and who is known to the company.[85]

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[79] *Insolvency Act 1986* (UK) s A38.
[80] *Insolvency Act 1986* (UK) ss A18 and A53(1).
[81] *Insolvency Act 1986* (UK) s 53(2).
[82] *Insolvency, Restructuring and Dissolution Act 2018* (Singapore) s 64(1).
[83] *Insolvency, Restructuring and Dissolution Act 2018* (Singapore) ss 64(8) and (14).
[84] *Insolvency, Restructuring and Dissolution Act 2018* (Singapore) s 64(4).
[85] *Insolvency, Restructuring and Dissolution Act 2018* (Singapore) s 64(3).