First step reforms

In its report on Corporate Insolvency in Australia (**Report**), the Parliamentary Joint Committee on Corporations and Financial Services (**PJC**) made a number of recommendations for reforms to be undertaken in the short term. This paper seeks to provide guidance to assist with the implementation of the following recommendations:

- Recommendation 8 – The committee recommends that as soon as practicable the government consider and consult on potential reforms to the:
    - Small business restructuring pathway, and
    - Simplified liquidation pathway.
- Recommendation 28 – The committee recommends that the government amends the Corporations Act 2001 to expressly clarify the treatment of trusts with corporate trustees during insolvency.

Small business restructuring (SBRs)

The attached information on suggested improvements to SBRs is consistent with ARITA's submission to the PJC, other than now including:

- A suggestion that eligibility for an SCVL be decoupled from SBRs as restructuring and liquidation are very different processes and there are limits on using either process more than once within a 7 year period.
- That the appointment of a receiver by a secured creditors with security over all or substantially all of the company's assets prevent the company from appointing a RP and where one is appointed after the RP, result in the termination of the SBR.
- Setting a process for dealing with insolvent companies where the plan is not accepted by creditors.

We have now also provided details on which provisions we consider are better dealt with as part of the legislation in the interests of simplifying the process further.

Simplified creditors' voluntary liquidation (SCVL)

The attached information on suggested improvements to SCVLs is consistent with ARITA's submission to the PJC, other than now including a suggestion that eligibility for an SCVL be decoupled from SBRs as restructuring and liquidation are very different processes and there are limits on using either process more than once within a 7 year period.

We have now also provided details on which provisions we consider are better dealt with as part of the legislation in the interests of simplifying the process further.

Dealing with Insolvency in Trusts

As part of his supplementary submission to the PJC, Dr Nuncio D'Angelo, a Partner at Norton Rose Fulbright and an expert in trusts, provided a draft outline of possible amendments to the Corporations Act to provide for the establishment of a register of trading trusts, extending corporate insolvency processes to insolvent trusts and allowing liquidators to deal with trusts assets, without fundamentally undermining the core tenants of the trust structure.

The key issue is to identify the trusts that the proposed laws should apply to without affecting the traditional asset holding/non-trading trusts. We have suggested consideration of the principles established for enterprises under the GST legislation as a starting point to separate out trading trusts, as it is a well-established precedent.

ARITA has previously worked with Dr D'Angelo on a submission to the Treasury's consultation on Clarifying the treatment of trusts under insolvency law in 2021. Our views on this issue are consistent and we strongly support the work of Dr D'Angelo.

The attached information on dealing with trusts in insolvency is largely similar to that submitted by Dr D'Angelo to the PJC, with small amendments to clarify the treatment of the external administrator's remuneration and which trusts are captured by the suggested amendments. It is also consistent with our submission to the Treasury mentioned above.

Small Business Restructuring
Revised legislation – ARITA proposal

Summary of significant changes

Changes to structure of legislation

- Move majority of legislation to Act rather than in Regulations.
- Problem it solves: cut down in complexity of the legislation.

Threshold for eligibility

- Remains at $1 million, but is calculated excluding:
    - Employee entitlements
    - Secured creditor deficiency
    - Lease future debts (unless the lease was terminated prior to the appointment of the RP)
    - Related party debts.
- Problem it solves: increases the effective amount of the threshold without significantly increasing the possible exposure of arms-length creditors to what is a lower information restructuring process. The idea of SBRs is to keep the process simple so that costs of the process are kept down. If the dollar value of debt is increased too much, the complexity of businesses eligible for the process is likely to be higher, which then can create conflict with the use of a simplified process and increase the risk of misuse of the process.
  Whilst it is not possible to accurately determine the likely increase in companies eligible for the process, we can say that a large number of SME companies have related party debt and the removal of this debt from the threshold amount will increase eligibility.

How secured creditors and owners/lessors dealt with under SBR

- Definition of admissible debt or claim to exclude:
    - Secured creditors
    - Lessors for amounts relating to periods after the date of appointment of the RP (unless the lease was terminated prior to the appointment of the RP).
- Secured creditors, owners/lessors should be unable to enforce their security solely due to the appointment of a restructuring practitioner (commonly referred to as an “ipso facto” moratorium similar to that contained in ss 415D, 434J, 451E and 454N of the *Corporations Act*). This would not prevent enforcement due to non-payment.
- Problems it solves:
    - difficulty in determining deficiency in secured creditor debt and what to do with forward lease payments where company wants to continue with leased assets.
    - Gives the restructuring an opportunity to succeed.

Impact of the appointment of a receiver

- If a secured creditor with security over all or substantially all of the company's assets has appointed a receiver or receiver and manager, the company is not eligible to appoint an RP.
- Appointment of a receiver over all or substantially all of the company's assets should also terminate the restructuring.
- Problem it solves:
    - The appointment of a receiver over all, or substantially all of the company's assets, means that there will be nothing of substance left to restructure within the business and an alternate external administration would be more appropriate.

Clarifying amount of creditor claims

- To ensure the accuracy of the schedule of debts and claims and the return under the plan, a simple debt confirmation process should be undertaken during the proposal period
- The debt confirmation process should be similar to a proof of debt process, whereby creditors confirm the amount of their debt that is to appear in the schedule of debts and claims and participate in the plan
- Failure to confirm the amount of debt by the designated date (say 15 business days after notice is given) will mean that the creditor is bound by the plan but does not participate in the payments under the plan
- Will need to be situations where the creditor can apply to court for the schedule of debts and claims to be varied.
- Problem it solves: Members have advised that some creditors are not engaging with the process and either not providing account details for plan payments or advising where debt is overstated. This creates issues and increases costs for the restructuring as the creditor is being paid more than they are entitled to due to overstated debt or the RP does not have confirmation of where to pay money. A debt confirmation process will also removes challenges to the schedule of debts and claims and extensions of the acceptance period, reducing costs and streamlining the process.

Process for varying a plan

- Creditors have the power to vary a plan once it has been made:
    - Company proposes variation to RP
    - Cost of variation to be agreed with RP as a fixed fee (regardless of outcome) and approved by the directors by resolution. Separate fee to the administration of the plan.
    - RP to write an explanation of the variation for creditors.
    - RP sends variation information to creditors and asks creditors whether variation should be accepted – min of 15 business days to "vote".
    - Variation accepted if majority of creditors who reply by the deadline state that the proposed variation should be accepted.

- Stay on default period while variation considered (as long as variation proposed prior to default period)
- If variation not accepted and default period exceeded, default period consequence applies at end of deadline.
- If variation not accepted but default period not exceeded, company can continue with plan in current form, propose a new variation (for additional fee) or terminate the plan.
- Creditors who are entitled to vote on original proposal can vote on the variation.
- No limit on the number of variations but total period of plan cannot exceed maximum period set under the Act (currently 3 years)

- Problem it solves: Currently have to go to court for variation of a plan which is very expensive

How winding up applications are dealt with

- Automatic stay of any winding up application until the end of the acceptance period.
- If plan is made, winding up application lapses (but creditors have right to apply to court for termination of plan - existing reg 5.3A.62).
- If plan is not made, application returns to court for hearing.
- If plan is made and then fails, and company goes into liquidation, relation back date is based on winding up application on foot at the time of the appointment of the RP. The relation back date is important for determining recoverable transactions in the liquidation.
- Problem it solves: Currently have to go to court to deal with the winding up application – can take numerous appearances which is very expensive. Debt levels are low and time frame is short so creditors should be given the opportunity to vote on proposed plan.

Who acts as RP

- RP is a registered liquidator and it is not clear whether the independence requirements that apply to other types of external administrations (eg liquidations and voluntary administrations) apply to SBRs.
- The Act needs to specifically recognise that the RP acts an adviser to the company and its directors, and that the proposed restructuring practitioner needs to be able to work with the company prior to the appointment being made without affecting their ability to accept the RP appointment (ie impact independence)
- This is very different to other external administrations where the appointee works for the creditors and remains independent from the directors.
- RP of a company should specifically not be able to transition to another type of external administration appointment (eg liquidator or voluntary administrator) due to the nature of the role of the RP (ie relationship working with the directors would prevent the RP from being independent in a subsequent appointment)
- Problem it solves: makes it clear that a relationship with the company prior to the appointment as an RP is not an issue for that appointment, as the RP works with the company. The independence issue to manage is the transition from SBR to another external administration.

Related party creditors

- Allow plans to treat related party creditors differently to arm's length creditors.
- The plan can effectively create a debt for equity swap for related party creditors.
- Regardless of their treatment under the plan, related party creditor claims should be extinguished by the plan consistent with other creditor claims.
- Problem it solves: Currently, related party creditors (such as the owners and their families) are unable to elect to receive, say, lower or no payment, to enhance the offer to other creditors and thereby increase the likelihood of the business continuing.

Assets under the plan

- Limit plans to the payment of cash by the restructuring practitioner so the restructuring practitioner simply distributes funds as agreed under the plan.

- Problem it solves: The current legislation allows for inclusion of non-cash assets in the plan and for the sale of those assets by the RP. The inclusion of non-cash assets is an unnecessary and potentially costly complication for an SBR process – where these are an issue, other processes are available (voluntary administration).

Creditor requests for information

- Remove creditors' rights to request information under the strict statutory process in exchange for enhanced specific reporting. Creditors will still be able to request information and this is likely to be provided, otherwise the creditor has the power to vote against the proposed plan.

- Problem it solves: Uncertainty about the level of information requests that may be received and the red tape around the request for information process results in possible increased costs that need to built into the fixed fee set for the SBR process

Reporting to creditors

- Currently not required under the Act, but the ATO requires a report including certain specific information before it will consider voting in favour of a proposal. Due to the fact that the ATO is usually a substantial creditor in most SBRs, for the plan to be accepted, the ATO needs to approve the plan. Therefore, reporting is being provided to all creditors.
- The Act should set specific reporting requirements and a need for the RP to provide an opinion on whether the company is likely to be able to meet the obligations under the plan.
- Problem it solves:
    - If the Act prescribes a level of reporting, it will provide certainty over what creditors should expect and remove the risk of "regulatory creep" by the ATO. It can also remove the need for creditors to be able to request information (refer above).

- Many creditors are also small businesses with a lack of understanding of the SBR process. There is also no meeting at which creditors can ask questions. Therefore, an opinion from the RP may assist these creditors with making their decision.

Outcome if plan not accepted

- Currently if a plan is not accepted, the company returns to the control of the directors notwithstanding that the company is insolvent. Company is deemed insolvent once the plan is sent to creditors.
- Creditors need to either incur additional cost to apply to the Court for the appointment of a liquidator or rely on the company to take action to appoint a liquidator.
- The RP cannot become the liquidator due to independence issues as a result of the nature of the role of the RP and the relationship with the directors.
- If the directors appoint a liquidator it is likely they will ask the RP for guidance on who to appoint.
- The company should automatically proceed to liquidation where the plan is not accepted by creditors. The RP should appoint the liquidator – cannot be the RP or a member of the RPs firm. This is in reality no different to the current situation where the directors appoint a liquidator recommended by the RP. CVL process is followed so creditors have the option of requesting a meeting and changing the liquidator.
- Problem it solves: Control of the company does not go back to the directors – it is not appropriate to return control of an insolvent company to the directors. Creditors do not have to either rely on the directors to take action or incur additional costs to get a liquidator appointed. Creditors still have the ability to seek a change of liquidator (as with the current CVL process where the liquidator is appointed by the directors). The liquidator could appoint a voluntary administrator if that is the right course of action for the company.

Appendix A: Flowchart – How SBRs should work

	Proposed process	Additional comments	Change	Cost & time savings
Pre-appointment	Directors identify that the company is having financial difficulties and seek assistance from a registered liquidator			
	Liquidator reviews company's financial position and future prospects, assesses eligibility for a small business restructuring (SBR)	Company pays for this work separately to the SBR process. Debt threshold for eligibility remains at $1M, but excludes any secured creditor deficiency, owner/lessor future debts and any related entity claims.	Threshold currently includes secured creditor deficiency and related party claims	
	The liquidator works as an adviser to the company and assists the directors to liaise with secured creditors to ensure their support (as secured creditors are outside the SBR), establish a list of creditors and amounts outstanding, start the process to get tax lodgements up to date and determine any outstanding employee entitlements and payment of those entitlements.	Ipso facto on all secured creditors, owners and lessors due to the appointment of an RP - does not prevent enforcement due to other breaches, such as non-payment.	Secured creditors are currently bound for any amount that their debt exceeds the value of the security, which sounds great, but the problem is that the value of the security is an estimate that would be difficult to determine and agree with the secured creditor. Without support of secured creditors, company would not be able to restructure. If secured debt needs to be compromised, VA may be a better option.	The RP is able to do more work in the pre-appointment period to assist the company to ensure eligibility and obtain support of creditors. This ensures that the process runs smoothly once the appointment is made. **Timeframe:** This period should take as much time is necessary (considering other issues that may force the company to act quickly).
	Act specifically recognises that the RP can work with the company prior to appointment.	Act should specifically recognise that the RP is able to assist the company prior to appointment as RP without impacting independence, as the RP's role is to assist the directors through the SBR process.	Currently independence requirements would prevent the prospective RP from working with the company extensively prior to appointment.	
	The directors appoint the liquidator in writing (liquidator must consent prior to appointment) that has been assisting the company as Restructuring Practitioner (RP) - after declaring company is insolvent or likely to become insolvent, that the company is eligible to do an SBR and approving the RPs remuneration for the RP (proposal and acceptance period)		Eligibility is currently done within 5 BD of appointment as is a extra step which is not necessary if RP is assisting company prior to appointment and can assist with directors making this determination at the time of appointment.	

Proposed process	Additional comments	Change	Cost & time savings
Automatic stay of any winding up applications		Not currently an automatic stay - company has to go to Court which is a big expense	Significant cost saving as company will no longer have to apply to Court for a stay of the winding up application and RP will not have to assist company. Will not distract company and RP from the SBR process.
Secured creditors unable to enforce security solely due to the appointment of an RP	Restructuring ends if RP terminates it, liquidator or VA appointed, Court Orders or directors terminate.		
Company trades in the ordinary course of business with RP to approve any transactions outside the ordinary course of business, has to disclose "restructuring practitioner appointed"			
RP by first BD after appointment: - lodgement with ASIC of appointment and company eligibility - PNW advertisement of appointment - notice of appointment, DIRRI and call for confirmation of claim to creditors - PNW advertisement calling for creditor claims	Confirming creditor claims at this point in the process means that once the plan is developed, the return to creditors will be more certain (there will not be changes to the amount of debt), the voting process will not be delayed if there are disputes about claims. A date should be set for claims to be lodged (in the same way that they are for dividends in liquidations - suggest 15 business days). If claims are not made by this date then the creditor is bound by the plan (if accepted) but will not participate in any payments under the plan - this will encourage creditors to confirm their debt. Creditor can dispute in Court if they want to participate but had not proved their claim. If creditor does go to Court, proposal period will need to extend - but this should be the exception. If the final list of creditor claims is greater than the threshold, the restructuring should terminate.	Creditor claims are currently dealt with in the acceptance period which can result in multiple variations being sent to creditors, which also necessitates creditors being able to change their vote during the acceptance period multiple times. Currently changes to creditor claims which result in the debt threshold being exceeded do not result in termination of the restructuring, which is an incentive for under estimating creditor claims.	This change will reduce costs as there will be less uncertainty regarding creditor claims and there will no longer be a need for RPs to include allowance in their fixed fee for variations of the proposal and extensions of the Acceptance Period.
Company should assist creditors with reasonable request for information. RP not required to provide information that will be sent to all creditors with the plan proposal.	Creditors' rights to request information should be limited in an SBR in view of the fact that this is meant to be a short and cost effective process, there are already many reporting points to keep creditors informed and it is proposed that better information is provided to creditors with the plan proposal.	Currently RPs are required to comply with all reasonable requests for information in the same way as a liquidator or voluntary administrator. Requests should be made to the company rather than RP. RP's limited to how a SBR works, how this SBR will work, what creditors will get, alternatives, other creditors, timing of payments - all provided in report, therefore RP should not be required to provide separately.	Current requirements result in uncertain costs as RP doesn't know how many queries will be received. RP has to include an allowance in the fixed fee even if there ends up being no queries. Creditors are still protected as they can ask queries - if they are not happy with response from company (or RP) then they will vote no.

	Proposed process	Additional comments	Change	Cost & time savings
Proposal period	With assistance of RP, the company prepares a restructuring plan. Plan can create a second class of creditors for related party creditors and that class can be treated differently. All arms length creditors have to be treated the same under the plan. Secured creditors, owners and lessors are not bound by the plan but the ipso facto on enforcement solely due to the appointment of the RP will continue to apply. Plan cannot be conditional, cannot involve the transfer of any assets other than cash and cannot give the RP for the plan the power to realise assets. Plan specifies the percentage of funds received from the company that are paid to the RP for remuneration.	For small closely held companies, directors often want to exclude related entities from participating in the plan in order to be able to improve the offer to unrelated creditors but this cannot currently be done. Conditions, transferring assets and sale of assets can result in increased costs - plans under SBRs should be straight forward simply involving the collection and distribution of cash. Any complex arrangements should be dealt with via a VA.	Creditors (including related party creditors) all have to be treated the same - related party creditors cannot be excluded from a payment under the plan. Conditions, making property (other than cash) available under the plan and giving the RP the power to sell assets on the company's behalf are currently allowed. Currently remuneration is a percentage of funds paid to creditors (assumable as assets other than cash can be made available as part of the plan). As it is proposed that only cash can be paid into the plan - remuneration should be expressed as a percentage of receipts.	Flexibility to exclude related creditors will result in better returns for creditors.
	RP prepares a statement about the plan setting out a minimum amount of information: - company assets - company secured debt - company creditors - contingent employee entitlements - related party debt/loans - potential return in liquidation excluding costs and recoverable property - a statement as to whether they have seen any evidence of transactions which may be recoverable in a liquidation (but no positive obligation to investigate) - a statement on their opinion as to whether the company is likely to be able to meet the obligations under the plan and any conditions on that opinion - a declaration that the information is correct to the best of their knowledge	The Act should be clearer about what the RP is required to do. Although current information requirements look to be low, the Act states that the RP commits a strict liability offence if the RP does not make reasonable inquiries into, and take reasonable steps to verify, the company's business, property, affairs and financial circumstances. It is not clear what this obligation is and as a result, extra costs will be incurred so the RP can undertake work which may not be necessary in order to protect themselves from a strict liability offence. However, it is important to get the balance of information right - onerous investigation and reporting obligations are costly. If the company's affairs are complex, a VA may be more appropriate as there are detailed reporting requirements for VAs.	Current reporting requirements are very limited - largely a declaration that the company is eligible, the company is likely to be able to discharge obligations under the plan, reasonable grounds that the company has set out information required. The limited information required to be provided does not enable creditors to make an informed decision about how to vote. The ATO (a common creditor) requests additional information before it will make a decision on how to vote.	This may cost a little more, however should prevent creditors needing to request more information in order to make an informed decision. It is important however that reporting is not complex and detailed - as if that level of reporting is necessary, a VA is a better option.

Proposed process	Additional comments	Change	Cost & time savings
Company must have paid all employee entitlements that are payable and have made all tax returns before the RP can send the plan to creditors.			**Timeframe:** Currently 20 business days, with ability to extend by a further 10 business days.
All creditor claims settled by this date.			Period will be dependent on how much time is given to creditors for the confirmation of claim process - will need to be either 10 or 15 business days, could be 10 business days since communication is via email. Could express the period as up to 20 business days so proposal could be sent before the end of the 20 business days (ie as soon as creditors confirmation period ends). RP should still be able to extend for 10 business days if necessary, but this should be the exception due to the pre-appointment work.
RP to send to creditors and lodge with ASIC the restructuring plan, proposal, standard terms, declaration and statement. RP to ask creditors to vote (not related party creditors).		Currently there is a confirmation of claim and dispute process here too - we have recommended this be moved to the proposal period rather than the acceptance period.	
Once the plan is sent, the company is insolvent. If the plan is cancelled, not made or terminated, control cannot be returned to the directors (company is insolvent). The company either has to go into VA or liquidation. RP cannot be appointed as administrator or liquidator.	As the company is insolvent, control cannot be returned to the directors. The company needs to progress to another form of external administration.	Currently if the plan is cancelled, not made or terminated (unless it is because of liquidation or VA) the control of the company is returned to the directors. This is not appropriate as the company is insolvent under law.	

	Proposed process	Additional comments	Change	Cost & time savings
Acceptance period	Creditors vote RP assesses creditor votes and determines if the plan has been made (majority in value of arms length creditors - not secured creditors, lessor future debts) If plan not accepted, company is insolvent (due to plan being proposed) and RP has to appoint a liquidator. Liquidator can then appoint a VA if a VA is a better option.	Directors would appoint liquidator recommended by RP - therefore no difference to the RP making the appointment. Retain CVL process after appointment of liquidator so creditors can replace liquidator.	Creditors can currently change their vote as many times as they want during the acceptance period due to the dispute process. No longer necessary. Secured creditors currently count for the amount of any deficiency	Reduced costs as there is only one voting process - no variations and no "revoting" by creditors. Cost effective transition to liquidation so that creditors do not have the added cost of applications to Court if directors do not act. **Timeframe:** Currently up to 20 business days - proposed changes will be 15 business days

	Proposed process	Additional comments	Change	Cost & time savings
Plan period	Plan made - RP for company becomes RP for plan unless company resolves to appoint someone else			
	RP within 2 BD of plan being made: - lodges notice of appointment with ASIC - lodges voting outcome with ASIC - advertises that plan made on the PNW - gives notice to creditors		At the moment there is a double up on lodgements with ASIC which can be streamlined (plan lodged again, details of debts and claims lodged again. Lodgement timing and what is lodged can be streamlined	
	Company can propose a variation of the plan which is voted on by creditors in the same way as the initial proposal. Company needs to pay RP extra to send variation information and determine voting outcome.	SBRs are corporate debt agreements. In debt agreements creditors can approve a variation.	At the moment it is only the Court that can approve a variation which is very expensive.	Process streamlined and more cost effective with company being able to offer a variation rather than having to go to Court and a more reasonable time period to rectify defaults. Cost of plan will not need to be made higher for variation as this will be an extra cost to the company and only if necessary. Appointment of a liquidator is quicker and cost effective and ensures that creditors are not left having to incur further costs to get a liquidator appointed if directors fail to act. **Timeframe:** Depends on the length of the plan - this will not change.
	Where the company fails to comply with the plan, it has 30 days to either comply with the plan or propose a variation. If either of these do not occur, the RP terminates the plan and notifies creditors and ASIC. The company must then be placed into liquidation or voluntary administration - it cannot be returned to the control of the directors.		At the moment the directors must notify the RP of contravention or likely contravention. RP then must notify ASIC and creditors of non-compliance within 2 BD. The RP is best placed to determine non-compliance. 2BD is too short for a small business. The business must be given a reasonable timeframe to try and comply or else vary the plan.	
	RP to appoint liquidator once company is non-compliant. Liquidator can then appoint a VA if a VA is a better option. Liquidator to follow CVL process, including the option for creditors to request a meeting of creditors to replace the liquidator.	Directors would appoint liquidator recommended by RP - therefore no difference to the RP making the appointment. Ensures that liquidator can be appointed immediately on failure of the plan. Retain CVL process after appointment of liquidator so creditors can replace liquidator.	At the moment there is no automatic appointment of a liquidator, so if directors don't appoint, creditors have to incur further costs to apply to Court.	
	RP collects payments under the plan and distributes funds to creditors.	Creditors do not have right to ask questions of he RP - RPs will deal with straightforward questions about the plan in the ordinary course without legislation. If creditors are unhappy with RP performance and/or payments not being made they can complain to ASIC.	At the moment the RP has the power to realise property but we propose that only cash can be dealt with under the plan, so this power is not required.	
	RP to lodge notice with ASIC, company and creditors when plan is complete (final payment made to creditors)	Directors do not notify RP of completion - RP knows when final payment to creditors is made.		

Appendix B: Structure of Legislation

Key to change column
M = Move to Act
L = Leave in Regulations
D = Delete
C = Change
N = New

Corporations Act

Current provision	Change	Edit
Division 1 – Preliminary		
452A Object of this Part		
452B Meaning of *property*		
DEFINITIONS	N, C	Definitions moved from regulations (may be moved to s9) Consider amending related entity to cover entities controlled/owned by spouse
Division 2 – Restructuring		
Subdivision A – When restructuring begins and ends		
453A Meaning of *restructuring*		
WHEN RESTRUCTURING ENDS	N	From regulation 5.3B.02 Most points are appropriate. However, directors can only terminate restructuring and take back control of company until the plan is sent (sending plan deems the company insolvent). Once plan is sent, coy either has to be placed into liq or VA to terminate. The appointment of a receiver over all or substantially all of the assets of the company should terminate the restructuring. Secured creditors to now stand outside the restructuring. Ipso facto to apply. If company cannot get the support of the secured creditor and secured creditor appoints a receiver over all or substantially all of the company's assets, there is no purpose to the restructuring. Restructuring must terminate if creditors exceed threshold – should it go in this section rather than the amended s 453J?
NOTICE OF END OF RESTRUCTURING	N	Reg 5.3B.53 Could incorporate into previous new section "When restructuring ends"
453J Restructuring practitioner may terminate restructuring	M, C	All termination provisions should be moved together.

Current provision	Change	Edit
		Must terminate if debts exceed $1M after creditors claims are verified
TERMINATION OF RESTRUCTURING	N	From reg 5.3B.06. Consider combining reporting requirements into current s453J
Subdivision B – Appointment of restructuring practitioner		
453B Appointing a restructuring practitioner	C	Directors need to make and sign declaration of eligibility at the time of making the appointment (incorporate reg 5.3B.49). Remove obligation for directors to make a statement about voidable transactions as directors do not have the knowledge to make this assessment without significant assistance from the RP. Company should not be able to appoint an RP if in receivership – this should be incorporated into the list of when an RP cannot be appointed.
453C Eligibility criteria for restructuring	C	Incorporate Reg 5.3B.24 into this section Having two levels of eligibility is confusing (ie some in s453C and some in reg 5.3B.24). It would be better to have it all together with the debt threshold amount in the regulations so it is easier to change if required. Maybe the requirements in s453C could be expressed as, "before the plan is sent the creditors by the RP, the company must have …"
453D Declaration by restructuring practitioner—relevant relationships		Relationship with directors and company does not prevent appointment – but must be disclosed (refer new provision after s456C)
NOTICE OF APPOINTMENT OF RESTRUCTURING PRACTITIONER FOR COMPANY	N	Reg 5.3B.50
NOTICE OF TERMINATION OF APPOINTMENT OF RESTRUCTURING PRACTITIONER FOR COMPANY	N	Reg 5.3B.51 – could combine notice requirements (former regs 5.3B.50 and 5.3B.51)
Subdivision C – Role of the restructuring practitioner during restructuring		
453E Functions, duties and powers of the restructuring practitioner		
453F Directors to help restructuring practitioner		
453G Restructuring practitioner's right to inspect books held by other persons		
453H Restructuring practitioner acts as company's agent		
~~453J Restructuring practitioner may terminate restructuring~~	M	Div 2, subdiv A
Subdivision D – Conduct of company during restructuring		
453K Control of company under restructuring		Edit subsection (2) for changes to position of secured creditors and the appointment of a receivership over all or substantially all assets terminates restructuring
453L Conducting the business of the company during restructuring		
453M Order for compensation where director involved in void transaction		
453N Effect of things done during restructuring of company	C	Transaction in good faith with the consent of the RP are not able to be set aside in a winding up (RP does not do transaction)
453P Effect of restructuring on company's members		
TRANSACTIONS OR DEALINGS IN THE ORDINARY COURSE OF BUSINESS	N	Reg 5.3B.04
CONSENT TO TRANSACTIONS OR DEALINGS OUTSIDE THE ORDINARY COURSE OF BUSINESS	N	Reg 5.3B.05

Current provision	Change	Edit
Subdivision E – Effect on company etc. during restructuring		
453Q Winding up company	C	Automatic stay of winding up application on the appointment of an RP. If plan accepted winding up application lapses. If plan is not accepted, winding up application heard. If plan fails, relation back date goes back to winding up application on foot on appointment of RP.
453R Restrictions on exercise of third party property rights		Secured creditors, owners and lessors (for future debts) to stand outside the SBR process. Cannot take enforcement action only due to the appointment of an RP.
453S Stay of proceedings	C	Only court should be able to consent to continuation of proceedings during the proposal and acceptance periods. RP is not in control of the company, it should not be the RP making these decisions.
453T Suspension of enforcement process		
453U Duties of court officer in relation to property of company	CS	Property should not be returned to the RP - property should be returned to the company. The company cannot deal with the property outside the ordinary course of business without RPs consent, so there is a level of protection around how property or money might be used
453V Lis pendens taken to exist		
453W Restructuring not to trigger liability of director or relative under guarantee of company's liability		
453X Property subject to a banker's lien—exemption from this Subdivision		
Subdivision F – Rights of secured party, owner or lessor during restructuring		Secured creditors, owners and lessors (for future debts) to stand outside the SBR process. Cannot take enforcement action due to the appointment of an RP. Court to retain powers to limit powers of secured party etc in relation to secured property (edits will be required due to removal of other provisions). Incorporate reg 5.3B.64 into new provisions. As this needs to cover restructuring and plan, consider moving to Division 6 Powers of the Court.
~~454A Application of Subdivision~~	D	
~~454B Application of sections 454C to 454H—PPSA security interests~~	D	
~~454C Secured party acts before or during decision period~~	D	
~~454D Where enforcement of security interest begins before restructuring~~	D	
~~454E Security interest in perishable property~~	D	
454F Court may limit powers of secured party etc. in relation to secured property	C, M	
~~454G Giving a notice under a security agreement etc.~~	D	
~~454H Sale of property subject to a possessory security interest~~	D	
~~454J Scope of sections 454K to 454M~~	D	
~~454K Where recovery of property begins before restructuring~~	D	
~~454L Recovering perishable property~~	D	
454M Court may limit powers of receiver etc. in relation to property used by company	C, M	
Subdivision G – Enforcement rights triggered by restructuring		
454N Stay on enforcing rights merely because the company is under restructuring etc.		
454P Lifting the stay on enforcing rights		
454Q Order for rights to be enforceable only with leave of the Court		
454R Self-executing provisions		
454S When other laws prevail—certain other Commonwealth Acts		

Current provision	Change	Edit
SUBDIVISION XX CREDITOR VERIFICATION OF DEBTS AND CLAIMS	N	NEW SUBDIVISION AND PROVISIONS Process for creditors to verify their debts during the proposal period. Notice of requirement to verify claim sent with notice of appointment. 15 business days to verify claim. If claim not verified then creditor is bound by the plan but does not participate in payments from the plan. Creditor has right to appeal to Court.
Division 3 – Restructuring plan		
455A Proposing a restructuring plan	C	Once a plan is proposed and the company is insolvent, then control of the company should not be able to return to directors. If directors terminate the restructuring, they either have a appoint a VA (not RP) or company goes into liquidation (RP not liquidator). RP appoints liquidator and liquidator must follow CVL process so creditors can replace the liquidator
455B Restructuring plan	C	Regulations on the plan moved into the Act – only limited matters should be retained in the regulations (refer new subdivision B and C below)
SUBDIVISION B – PROPOSING A RESTRUCTURING PLAN	*N*	
HOW A RESTRUCTURING PLAN IS *PROPOSED*	N	Reg 5.3B.14
CONTENTS OF RESTRUCTURING PLAN	N	Reg 5.3B.15, 5.3B.16 A set template does not work - should be a list of content to include but not a set format. Further basic financial information needs to be provided that is currently not prescribed - assets, secured debt, redundancy entitlements for example. The plan should only provide for payments of cash - giving property to the RP to deal with is too expensive and time consuming. If property needs to be sold the company should do it. Restructuring proposal statement should not be a separate document – form part of the plan (reg 5.3B.16)
STANDARD TERMS FOR RESTRUCTURING PLANS		Reg 5.3B.27 This provision should set the standard terms to be part of the plan. Could be included as part of the previous provision “Content of restructuring plan” Related party creditors should be able to be excluded from the plan payment process in order to be able to improve the return to unrelated creditors. Q - Related parties can't vote - so does there need to be some way of binding them?
MEANING OF *PROPOSAL PERIOD*	N	Reg 5.3B.17 – will need amendment due to moving creditor verification process to proposal period. Creditor to be able to apply to court if did not participate in verification process and thus excluded from plan payments.
RESTRUCTURING PRACTITIONER MUST MAKE DECLARATION IN RELATION TO RESTRUCTURING PLAN	N	Reg 5.3B.18 Obligations of the RP in (4) need to be clarified. Would be better to have a list of matters that the RP needs to report on and make a declaration about. A wide ranging declaration not pinned to particular obligations/information, results in increased costs for the restructuring as more work needs to be done to verify information beyond that reported.

Current provision	Change	Edit
RESTRUCTURING PRACTITIONER MUST NOTIFY COMPANY OF DEFECT IN RESTRUCTURING PLAN	N	Reg 5.3B.19
PROPOSAL TO MAKE RESTRUCTURING PLAN LAPSES	N	Reg 5.3B.20 Control should not return to the directors – company should immediately go into liquidation and have been deemed to have met the requirements for a CVL. RP cannot be liquidator. RP appoints liquidator and liquidator must follow CVL process so creditors can replace the liquidator.
PROPOSING A RESTRUCTURING PLAN TO CREDITORS	N	Reg 5.3B.21 and 5.3B.52 Amend the verification process as this is now done in the proposal period Incorporate notice requirement from reg 5.3B.52
SUBDIVISION C – ACCEPTING A PROPOSAL FOR A RESTRUCTURING PLAN	N	
ACCEPTANCE OF RESTRUCTURING PLAN	N	Reg 5.3B.25
HOW A RESTRUCTURING PLAN IS *MADE*	N	Reg 5.3B.26
PARTIES TO RESTRUCTURING PLAN	N	Reg 5.3B.28
EFFECT OF RESTRUCTURING PLAN	N, C	Reg 5.3B.29 Needs editing for changes to secured creditors, owners and lessors
PROTECTION OF COMPANY'S PROPERTY FROM PERSONS BOUND BY RESTRUCTURING PLAN	N	Reg 5.3B.30
NOTICE OF APPOINTMENT OF RESTRUCTURING PRACTITIONER FOR RESTRUCTURING PLAN	N	Reg 5.3B.54
NOTICE OF MAKING OF RESTRUCTURING PLAN	N	Reg 5.3B.55
SUBDIVISION XX – CONTRAVENTION OF RESTRUCTURING PLAN	N	
NOTICE OF CONTRAVENTION OF RESTRUCTURING PLAN	N	Reg 5.3B.56 2 days is a very short period - suggest extending this to give company time to try and rectify the non-compliance or offer a variation to the plan.
Subdivision XX – VARIATION OR TERMINATION OF THE RESTRUCTURING PLAN	N	
CREDITOR POWER TO VARY OR TERMINATE A PLAN	N	NEW PROVISIONS Creditors have the power to vary or terminate a plan once the plan is made.
WHEN COURT MAY VARY RESTRUCTURING PLAN	N	Reg 5.3B.61
WHEN COURT MAY VOID OR VALIDATE RESTRUCTURING PLAN	N	Reg 5.3B.62
WHEN COURT MAY TERMINATE RESTRUCTURING PLAN	N	Reg 5.3B.63
WHEN RESTRUCTURING PLAN TERMINATES	N	Reg 5.3B.31 Add in as a grounds for termination of the plan - Receiver is appointed over all or substantially all of the company's assets. Company should have power to terminate plan, offer a variation of the plan and there should be a longer period than 30 BD for termination on contravention of the plan
EFFECT OF TERMINATION OR AVOIDANCE	N	Reg 5.3B.32

Current provision	Change	Edit
NOTICE OF TERMINATION OF RESTRUCTURING PLAN	N	Reg 5.3B.57 – consider incorporating with "When restructuring plan terminates" (former reg 5.3B.31). It is the RP not the directors who will know when all obligations under the plan have been completed (last payment made to creditors) - so directors should not be providing notice under (a). The RP may know about an event before being notified by the directors, so (2) should be amended.
Division 4 – The restructuring practitioner		
Subdivision A – Qualifications of restructuring practitioners		
456A Appointee must consent		
456B Restructuring practitioner must be registered liquidator		
456C Disqualification of person connected with company		
RP RIGHT TO WORK WITH COMPANY PRIOR TO APPOINTMENT	N	NEW PROVISION Proposed RP able to work with the company prior to appointment without affecting ability to accept appointment – usual independence rules regarding relationship with directors and the company does not apply.
Subdivision B – Removal and replacement of restructuring practitioner		
456D Appointment of restructuring practitioner cannot be revoked		
456E Vacancy in office of restructuring practitioner for company		
456F Declarations by replacement restructuring practitioner—relevant relationships		
Subdivision C – Rights, obligations and liabilities in relation to the restructuring practitioner		
~~456G Rights, obligations and liabilities of a company and its officers in relation to the restructuring practitioner~~	D	Regulations to be moved to form part of the Act. This provision can be deleted as it is a section referring power to the regulations.
456H No liability for consent etc.		
~~456J Right of indemnity~~	D	RP incurs no debts so right of indemnity not required. Adds complexity to the SBR process – process should be simple.
~~456K Right of indemnity has priority over other debts~~	D	
~~456L Lien to secure indemnity~~	D	
456LA Restructuring practitioner has qualified privilege		
456LB Protection of persons dealing with restructuring practitioner		
Subdivision D – Appointment of 2 or more restructuring practitioners		
456M Appointment of 2 or more restructuring practitioners of company		
456N Appointment of 2 or more restructuring practitioners of restructuring plan		
SUBDIVISION E – RESTRUCTURING PRACTITIONER FOR A RESTRUCTURING PLAN	N	
APPOINTMENT OF RESTRUCTURING PRACTITIONER FOR RESTRUCTURING PLAN	N	Reg 5.3B.33
VACANCY IN OFFICE OF RESTRUCTURING PRACTITIONER FOR RESTRUCTURING PLAN	N	Reg 5.3B.34

Current provision	Change	Edit
NOTICE OF TERMINATION OF APPOINTMENT OF RESTRUCTURING PRACTITIONER FOR RESTRUCTURING PLAN	N	Reg 5.3B.58
DECLARATION BY NEW AND REPLACEMENT RESTRUCTURING PRACTITIONERS – RELEVANT RELATIONSHIPS	N	Reg 5.3B.35
REPLACEMENT DECLARATIONS—RELEVANT RELATIONSHIPS	N	Reg 5.3B.36
FUNCTIONS OF RESTRUCTURING PRACTITIONER FOR RESTRUCTURING PLAN	N	Reg 5.3B.37 RP does not need the power to realise assets as plan should be limited to the collection and distribution of cash. Remove this function.
REPLACEMENT RESTRUCTURING PRACTITIONER MUST LODGE OUTSTANDING NOTICES ETC	N	Reg 5.3B.38
PROTECTION FROM LIABILITY	N	Reg 5.3B.42
Division 5 – Information, reports, documents etc.		
457A Regulations may deal with information etc.		
457B Notice in public documents of company		
457C Effect of contravention of this Division		
Division 6 – Powers of Court		
458A General power to make orders		
458B Other powers of the Court		
~~*Division 7 – Other matters*~~	D	No longer required
~~458C Time for doing act does not run while act prevented by this Part~~		
~~458D Meaning of *restructuring relief period*~~		
~~458E Meaning of *eligible for temporary restructuring relief*~~		
~~458F Directors declare company not eligible for temporary restructuring relief~~		
~~458G Court order that company not eligible for temporary restructuring relief~~		
~~458H Obligation on registered liquidator to report~~		

Corporations Regulations

Current provision		Edits
~~*Division 1 – Preliminary*~~		
~~5.3B.01 Definitions~~	M	Div 1
Division 2 – Restructuring		
Subdivision A – Restructuring generally		
~~5.3B.02 When restructuring ends~~	M	Move to Div 2, Subdiv A
5.3B.03 Eligibility criteria for restructuring	L, C	Change eligibility criteria to $1M debt excluding: o Employee entitlements o Secured creditors o Future lease payments (unless lease terminated prior to appointment of RP)

Current provision		Edits
		○ Related party debt Suggest reconsider eligibility requirements regarding prior use of simplified liquidation and SBR – consider reduction from 7 years to 3 or 5 years.
~~5.3B.04 Transactions or dealings in the ordinary course of business~~	M	Move to Div 2, Subdiv D
~~5.3B.05 Consent to transactions or dealings outside the ordinary course of business~~	M	Move to Div 2, Subdiv D
5.3B.06 ~~Termination of restructuring~~	M	Move to Div 2, Subdiv C
~~*Subdivision B – Restructuring practitioner for company under restructuring*~~	~~*D*~~	
~~5.3B.07 Authority~~	D	
~~5.3B.08 Powers of restructuring practitioner for company under restructuring~~	M	Move to Div 2, Subdiv C
~~5.3B.09 Replacement restructuring practitioner must fulfil certain past requirements~~	M	Move to Div 2, Subdiv C
~~5.3B.11 Protection from liability~~	M	Move to Div 2, Subdiv C
Subdivision C – Stay on enforcing rights merely because the company is under restructuring etc.		
5.3B.12 Prescribed kinds of contracts, agreements or arrangements under which rights are not subject to the stay in section 454N of the Act		
~~*Division 3 – Restructuring plan*~~		
~~*Subdivision A – Preliminary*~~	~~*D*~~	
~~5.3B.13 Authority~~	D	
~~*Subdivision B – Proposing a restructuring plan*~~	M	Div 3, subdiv B
~~5.3B.14 How a restructuring plan is *proposed*~~	M	Div 3, subdiv B
~~5.3B.15 Contents of restructuring plan~~	M	Div 3, subdiv B
~~5.3B.16 Restructuring proposal statement~~	M	Div 3, subdiv B Proposal statement should form part of plan – not seperate
~~5.3B.17 Meaning of *proposal period*~~	M	Div 3, subdiv B
~~5.3B.18 Restructuring practitioner must make declaration in relation to restructuring plan~~	M	Div 3, subdiv B
~~5.3B.19 Restructuring practitioner must notify company of defect in restructuring plan~~	M	Div 3, subdiv B
~~5.3B.20 Proposal to make restructuring plan lapses~~	M	Div 3, subdiv B
~~5.3B.21 Proposing a restructuring plan to creditors~~	M	Div 3, subdiv B
~~5.3B.22 Creditors may dispute schedule of debts and claims before restructuring plan is made~~	D	Replace current process with a requirement for creditors to verify claims during the proposal period– similar to a liquidation proof of debt process
~~5.3B.23 Creditors may change vote~~	D	Will not be required if creditor claim verification process happens during the proposal period
~~5.3B.24 Company under restructuring must do certain things~~	M	Incorporate into the eligibility requirements in s453C
~~*Subdivision C – Accepting a proposal for a restructuring plan*~~	~~*M*~~	Div 3, Subdiv C
~~5.3B.25 Acceptance of restructuring plan~~	M	Div 3, Subdiv C
~~5.3B.26 How a restructuring plan is *made*~~	M	Div 3, Subdiv C
~~5.3B.27 Standard terms for restructuring plans~~	M	Div 3, Subdiv B
~~5.3B.28 Parties to restructuring plan~~		Div 3, Subdiv C
~~5.3B.29 Effect of restructuring plan~~		Div 3, Subdiv C
~~5.3B.30 Protection of company's property from persons bound by restructuring plan~~		Div 3, Subdiv C
~~5.3B.31 When restructuring plan terminates~~		Div 3, new subdiv

Current provision		Edits
~~5.3B.32 Effect of termination or avoidance~~		Div 3, new subdiv
~~*Subdivision D – Restructuring practitioner for a restructuring plan*~~	~~*M*~~	Div 4, Subdiv E (new subdivision)
~~5.3B.33 Appointment of restructuring practitioner for restructuring plan~~	~~M~~	
~~5.3B.34 Vacancy in office of restructuring practitioner for restructuring plan~~	~~M~~	
~~5.3B.35 Declaration by new and replacement restructuring practitioners – relevant relationships~~	~~M~~	
~~5.3B.36 Replacement declarations – relevant relationships~~	~~M~~	
~~5.3B.37 Functions of restructuring practitioner for restructuring plan~~	~~M~~	
~~5.3B.38 Replacement restructuring practitioner must lodge outstanding notices etc~~	~~M~~	
~~5.3B.39 When restructuring practitioner may dispose of encumbered property~~	~~D~~	RP to only collect and distribute funds. Plan limited to cash only
~~5.3B.42 Protection from liability~~	~~M~~	Div 4, Subdiv E (new subdivision)
~~5.3B.43 Right of indemnity~~	~~D~~	These provisions are not necessary and should be deleted. Remuneration can only be a % of payments made under the plan so there is no need for an indemnity or a lien to secure it.
~~5.3B.44 Right of indemnity has priority over other debts~~	~~D~~	
~~5.3B.45 Lien to secure indemnity~~	~~D~~	
~~*Division 4 – The restructuring practitioner*~~	~~*D*~~	Not necessary
~~5.3B.46 Authority~~	~~D~~	
~~5.3B.47 Company must notify restructuring practitioner of certain matters~~	~~D~~	Repeats reg 5.3B.57
~~*Division 5 – Information, reports, documents etc.*~~	~~D~~	No longer required
~~*Subdivision A – Preliminary*~~		
~~5.3B.48 Authority~~		
~~*Subdivision B – Information, reports, documents etc. during restructuring*~~		*No longer required*
~~5.3B.49 Declaration by directors – eligibility to be under restructuring and other matters~~	~~M~~	Move this declaration as part of appointment in s453B
~~5.3B.50 Notice of appointment of restructuring practitioner for company~~	~~M~~	Div 2, Subdiv B
~~5.3B.51 Notice of termination of appointment of restructuring practitioner for company~~	~~M~~	Div 2, subdiv B
~~5.3B.52 Notice of restructuring plan etc. given to affected creditors~~	~~M, C~~	Div 3, Subdiv B
~~5.3B.53 Notice of end of restructuring~~	~~M~~	Div 2, Subdiv A
~~*Subdivision C – Information, reports, documents etc. once restructuring plan is made*~~		*No longer required*
~~5.3B.54 Notice of appointment of restructuring practitioner for restructuring plan~~	~~M~~	Div 3, Subdiv C
~~5.3B.55 Notice of making of restructuring plan~~	~~M~~	Div 3, Subdiv C
~~5.3B.56 Notice of contravention of restructuring plan~~		Div 3, new subdiv on contravention of restructuring plan
~~5.3B.57 Notice of termination of restructuring plan~~	~~M~~	Div 3, new subdivision on variation and termination of plan
~~5.3B.58 Notice of termination of appointment of restructuring practitioner for restructuring plan~~	~~M~~	Div 4, subdiv D
~~*Division 6 – Powers of Court*~~	~~*D*~~	No longer required
~~5.3B.59 Authority~~	~~D~~	
~~5.3B.60 Court may make orders in relation to creditor disputes before restructuring plan is made~~	~~D~~	Process replaced with creditor verifications during proposal period. Court will need powers for new process
~~5.3B.61 When Court may vary restructuring plan~~	~~M~~	New subdivision in Div 3
~~5.3B.62 When Court may void or validate restructuring plan~~	~~M~~	
~~5.3B.63 When Court may terminate restructuring plan~~	~~M~~	
~~5.3B.64 Court may limit rights of secured creditor or owner or lessor~~	~~M~~	Move and incorporate into Court powers regarding secured property in Div 2, Subdiv F

Current provision		Edits
Division 7 – Other matters		
5.3B.65 Approved forms		May need to include a similar provision in the Act if forms provisions have now been moved to the Act from the Regulations.

Simplified liquidation
Revised legislation – ARITA proposal

Summary of significant changes

Remove ability to litigate in an SL (excluding in relation to proof of debt)

Simplify the commencement process

- Liquidator assesses eligibility and makes a determination as to whether simplified process may be suitable based on information in the ROCAP.
- Creditor information already available in ROCAP – will need to add a question to ROCAP regarding tax lodgements and prior use of simplified or SBR process
- Liquidator adopts simplified liquidation within 20 business days of appointment
- Directors do not have to certify eligibility as information included in ROCAP
- Creditors will have 10 business days from when notice is given to contest the adoption of the simplified liquidation process – at least 25% in value of creditors (excluding related creditors) object to have liquidation revert to normal liquidation.
- ASIC be given the power require the termination of the simplified process – ASIC need to provide reasons for termination.
- Notice should not be provided to members as is currently required – members have no say in the liquidation process so there is no benefit with providing them notice of the simplified liquidation.
- Problems it solves:
    - Currently the process is complex with difficult to understand timeframes. The proposed changes will make timeframes easier to understand.
    - Directors currently have to certify eligibility when in reality it is the liquidator that would determine eligibility as the liquidator understands the eligibility requirements and the process

Extend the simplified process to Court Liquidations

- Currently the simplified process is only available for creditors' voluntary liquidations.
- Court liquidations should be able to use the simplified process.
- Adoption based on information in ROCAP.
- ROCAP is required to be provided to liquidator within 10 business days (s475) – liquidator to make assessment and adopt simplified liquidation within 20 business days
- Problem it solves: Both low debt creditors' voluntary and court liquidations should be able to be run as simplified liquidations to reduce the costs of the liquidation process. This is particularly important due to the high level of liquidations in which there are sufficient funds to meet the cost of the liquidation process. Encourages directors to comply with their requirement to lodge a ROCAP.

Separate simplified liquidations from small business restructuring

- Use of a simplified liquidation should not prevent a director from utilising SBRs in the future.

- The simplified liquidation and SBR processes serve very different purposes and the use of one should not limit the use of the other.
- Problem it solves: Will reduce restrictions on the use of simplified liquidations and SBRs.

Increase maximum statutory remuneration

- Currently the maximum statutory remuneration amount is $5,000 indexed. This is the amount that can be drawn without having to seek approval of creditors or the court before drawing remuneration.
- The benefit is that the significant costs of preparing a remuneration report and requesting approval do not have to be incurred (noting that a remuneration report and approval is required before any remuneration can be drawn notwithstanding the source of funds).
- To minimise costs in a liquidation, we recommend this amount is increased to $10,000 indexed which would mean that remuneration approval would not likely be needed on most simplified liquidations – significantly reducing the costs of the remuneration process and thus the liquidation process overall.
- This change would be beneficial, and potentially reduce costs, for all liquidations and not just SCVLs
- Problem it solves: Removes the cost of seeking approval of remuneration for many liquidations.

Give creditors the right to end a simplified liquidation

- Creditors should have the right to end a simplified liquidation process where they assess that they would be better off having the company subject to a full liquidation process. For example, if litigation is required to make recoverable transactions, creditors should be able to choose whether to end the simplified process to allow for litigation or not.
- Same percentages and who is entitled to vote apply as in objecting to adoption.
- Liquidator still required to end simplified process where company no longer meets eligibility requirements or fraud by directors.
- Problem solved: gives creditors the power to make decisions about how the liquidation is handled.

Improve the dividend process

- Allow multiple dividends to priority employee creditors only to allow for timely payment of entitlements
- Remove the need for a formal proof of debt process and allow rejection of claims without a formal proof
- Remove need for an ATO clearance (noting that tax affairs have to be up to date prior to adoption of simplified liquidation and ATO will be given the same opportunity as other creditors to submit its claim)
- Problem it solves – allows for employees to be paid promptly, reduces delays with obtaining ATO clearance (can be in excess of 6 mths), reduces the cost of the dividend process

Clarify investigation, reporting and provision of information requirements

- Remove the statutory obligation for creditors to have a right to request information
- Clarify the extent of investigations required by the liquidator
- Streamline reporting obligations
- Problems it solves:
    - while creditors should always have a right to discuss the liquidation with the liquidator and obtain information as a stakeholder in the process, removing the statutory obligation to respond would ensure that a small number of creditors do not add significant costs to the process with multiple and/or lengthy requests for information that offer no benefit to the general body of creditors
    - While liquidators do not have a requirement to comprehensively report on the company's business and affairs, it is unclear whether these matters must still be investigated to enable a liquidator to determine if reasonable grounds exist to lodge a misconduct report with ASIC. These investigations create significant costs and are arguably only for the benefit of ASIC. Therefore clarification of investigation and reporting requirements will reduce costs to the liquidation.

Appendix A: Flowchart – How SLs should work

	Proposed Process	Additional comments	Change	Cost & time savings
Appointment & adoption	Court or Directors initiate the appointment or other triggering event occurs and liquidator appointed	Every step from triggering event to adoption must occur within 20 business days otherwise simplified liquidation is not an option	Process continues to start as normal creditors voluntary liquidation but should be extended to be available in a Court liquidation	In addition to providing significant cost savings, enabling the liquidator to commence a simplified liquidation process and giving creditors the right to opt out provides greater clarity and certainty for the liquidator and removes significant confusion about the current adoption process. The current adoption process is red tape intensive, simplifying the process will streamline the adoption process and remove the additional time added by the current requirements.
	Directors provide liquidator with Report on Company Affairs and Property (ROCAP).	Use of the simplified liquidation process will not prevent a director from being able to subsequently use small business restructuring and visa versa.	Include a question in ROCAP for status of tax lodgements and prior use of simplified liquidation process.	
	Liquidator makes determination to adopt simplified liquidation process based on review of eligibility from information available in the ROCAP and notifies creditors of adoption within 20 business days of appointment.		No notification requirements to members	
	Creditors have 10 business days from when notice is given to contest adoption of simplified liquidation		Creditors contest use of the simplified process once adopted, rather than objecting to the adoption	

	Proposed Process	Additional comments	Change	Cost & time savings
Investigation & reporting	Liquidator proceeds to realise assets, recover voidable transactions and pursue insolvent trading if in the interests of creditors		Remove ability to undertake litigation in simplified liquidation (except as part of proof of debt process). Liquidator may recommend to creditors and seek resolution by proposal to terminate simplified process and revert to full liquidation if litigation is to be pursued.	Litigation creates significant costs in liquidations, these costs are counterintuitive to a streamlined process and should be removed. Litigation can often add years to a liquidation process. Removing the ability to litigate from the streamlined liquidation process could enable simplified liquidations to be finalised years earlier.
	Liquidator may issue proposals seeking approval of resolutions including remuneration (must supply remuneration report), compromise of debts and arrangements longer than 3 months	Objections to proposals being resolved without a meeting do not apply in simplified liquidation	Increase statutory maximum remuneration a liquidator may receive without need to obtain approval to $10,000 (excluding GST) indexed, currently $5,725 (excluding GST)	An increase in the maximum statutory fee for streamlined liquidations would remove or limit the reporting and approval of remuneration from creditors. Fulfilling the reporting and approval process has a substantive cost and many liquidators may choose to take a reasonable statutory fee, rather than incurring the additional time and cost of reporting and seeking approval for a streamlined liquidation, particularly considering low asset levels in many liquidations.
	Liquidator issues simplified Statutory Report by Liquidator within 3 months of appointment	Offence report must be lodged with ASIC if liquidator has reasonable grounds to believe misconduct has occurred	Streamline reporting requirements and clarify the extent of investigations required by the liquidator. Remove statutory obligation for liquidator to respond to creditor requests for information, however give creditors right to seek to terminate simplified process.	While liquidators do not have a requirement to comprehensively report on the company's business and affairs, it is unclear whether these matters must still be investigated to enable a liquidator to determine if reasonable grounds exist to lodge a misconduct report with ASIC. These investigations create significant costs and are arguably only for the benefit of ASIC. Similarly, while creditors should always have a right to discuss the liquidation with the liquidator and obtain information as a stakeholder in the process, removing the statutory obligation to respond would ensure that a small number of creditors do not add significant costs to the process with multiple and/or lengthy requests for information that offer no benefit to the general body of creditors.

	Proposed Process	Additional comments	Change	Cost & time savings
Dividend & finalisation	If there are sufficient funds, liquidator advertises notice of intention to declare dividend and notify creditors (payment of interim dividends permissible to priority employee creditors and a single dividend for ordinary unsecured creditors). Liquidator receives and adjudicates on proofs of debt. Creditor may appeal to Court if liquidator rejects all or part of their claim. Once all recoveries and any proceedings regarding proof of debt are finalised, liquidator declares final dividend for all classes of creditors (must be first & final for ordinary unsecured creditors), issues notice of declaration and payments Liquidator finalising liquidation and ASIC deregisters company after 3 months	All recovery actions MUST be finalised prior to dividend being declared as legislation only allows for a single dividend to be declared and distributed to all classes of creditors, including employees All Court proceedings MUST be finalised prior to dividend being declared as legislation only allows for a single dividend to be declared and distributed to all classes of creditors, including employees An ordinary unsecured creditor who does not prove prior to the dividend is not entitled to an equalising dividend	Remove the requirement to obtain tax clearance from the ATO (noting tax documentation must be up to date to be eligible for simplified process). Remove current optional duplication of advertising for proofs of debt. Formal proofs not required - informal proofs/claims can be rejected without need for formal proof. Priority employee creditors entitled to more than one dividend.	While enabling additional dividends to be paid to priority employee creditors will not have any direct time and cost savings, it is unreasonable for employees to have to wait for the conclusion of the liquidation to be paid (noting that not all priority employee amounts can be paid by the Fair Entitlement Guarantee). Time and cost savings would be made by removing the requirement to get tax clearance from the ATO (it can still prove for the debt owing and historically it has taken 90-120 days for the ATO to provide clearance) and the need for small creditors to lodge a proof of debt.
Cessation	Must cease simplified process if: - eligibility criteria no longer met - company or director engaged in dishonesty which as material adverse effect on interests of creditors - creditors resolve		Extend to include right of creditors to terminate following a resolution by proposal issued at discretion of liquidator or request of creditors (subject to 25% threshold)	While this would not offer any time or cost savings it would ensure integrity in the system and protect creditor rights.

Appendix B: Structure of Legislation

Key to change column
M = Move to Act
L = Leave in Regulations
D = Delete
C = Change
N = New

Corporations Act

Current provision	Change	Edit
Division 3 – Creditors' voluntary winding up		
Subdivision B--Simplified liquidation process for creditors' voluntary winding up of an insolvent company		
500AAA Meaning of triggering event	C	Include appointments by the Court
500A Liquidator may adopt the simplified liquidation process	C	Change the process so that the liquidator adopts simplified process within 20 business days and then creditors have 10 business days to object to the adoption.
500AA Eligibility criteria for the simplified liquidation process	C	Declaration of eligibility not required – liquidator makes determination of eligibility based on information in the ROCAP Previous SBR not a restriction to using a simplified liquidation
500AB Creditors may request liquidator not to follow the simplified liquidation process	C	Creditors have 10 business days from when notice of adoption of simplified liquidation is given to object
500AC Liquidator must cease to follow the simplified liquidation process		
500AD Working out whether the 25% in value of creditors test met		
500AE Simplified liquidation process		Liquidator does not have to comply with requests for information – only need to send statutory notifications and reports. Liquidator cannot undertake litigation – if litigation is required the simplified liquidation needs to end and convert to a normal liquidation.

Corporations Regulations

Current provision	Change	Edits
Part 5.5 – Voluntary Winding up		
Division 2 – Simplified Liquidation Process		
Subdivision A - Preliminary		
5.5.02 Declaration about eligibility for simplified liquidation process and other matters	D	Declaration of eligibility not required – liquidator makes determination of eligibility based on information in the ROCAP
5.5.03 Eligibility criteria for simplified liquidation process	C	Previous SBR not a restriction to using a simplified liquidation
Subdivision B – Simplified liquidation process		

Current provision	Change	Edits
5.5.04 Transactions that are not voidable		
5.5.05 Reports by liquidator	C	Streamline reporting requirements and clarify the extent of investigations required by the liquidator. While liquidators do not currently have a requirement to comprehensively report on the company's business and affairs, it is unclear whether these matters must still be investigated to enable a liquidator to determine if reasonable grounds exist to lodge a misconduct report with ASIC. As investigations create significant costs – the liquidator's obligations need to be clarified.
5.5.06 Notice of adoption of simplified liquidation process	D	Notice only required if simplified liquidation process is ceased (for whatever reason – ie. creditor objection, ceasing to be eligible, creditor vote to convert to normal liquidation etc). This obligation is covered by reg 5.5.08
Subdivision C – Ceasing of simplified liquidation process		
5.5.07 Liquidator must cease to follow the simplified liquidation process	C	Liquidator must also cease simplified liquidation if at any time more than 25% of value of creditors (other than those excluded under 5.5.09) direct
5.5.08 Transition from simplified liquidation process		
5.5.09 Working out whether the 25% in value of creditors test met		
Part 5.6 Winding up Generally		
Proof of Debt and dividend process	C	• Formal proof process to not apply • Informal claim can be rejected in a simplified liquidation • Only one advertisement/notice required for lodging claim and declaring dividend • More than one dividend can be paid for priority creditors

Insolvency Practice Schedule

Current provision	Change	Edits
IPS 60-15 Maximum default amount	C	Increase the maximum default amount for simplified liquidations to $10,000 indexed to reduce costs of remuneration approval process in low cost liquidations

Other legislation

Current provision	Change	Edits
260-45 Taxation Administration Act 1953	C	• Amend to not require a tax clearance in a simplified l liquidation

External administration of insolvent trustees and trusts - Legislative suggestions
Dr Nuncio D'Angelo and ARITA

Item	Corresponding part of the Corporations Act	Suggested components of new Chapter 5AA *Dealings with Relevant Trusts and their External Administration*
1.	Executive summary	***Overall summary*** In summary, the overall objective of the suggested framework is to equate or align, as far as legally possible, the legal risks and outcomes in insolvency faced by parties who deal with trustees of certain commercial trusts, with those of parties who deal with *Corporations Act* companies acting in their own right, but without otherwise interfering with the essential nature of the trust or the many benefits that accrue to those who use and deal with them as business vehicles. That requires legislation at two levels: (a) protections for parties who deal with trustees of relevant trusts, that operate at the point of transacting and correspond to those that are available to parties dealing with companies acting in their own right (**front-end reforms**); and (b) provisions dealing with insolvent trustees and trusts that reflect the same policy prescriptions and yield the same or equivalent stakeholder outcomes as in a corporate insolvency under Chapter 5, to the maximum extent possible (**back-end reforms**), in each case, after taking into account and allowing for the important legal and structural differences between companies and trusts. ***Which trusts?*** These new provisions should apply, to: (a) any trust where the trustee carries on or is starting an enterprise including activities done in the form of a business[1], in their trustee capacity in Australia (subject in each case to a prescribed *de minimis* threshold); and

[1] Consistent with section 9.20 of A New Tax System (Goods and Services Tax) Act 1999

Item	Corresponding part of the Corporations Act	Suggested components of new Chapter 5AA *Dealings with Relevant Trusts and their External Administration*
		(b) registered managed investment schemes (**MIS**) to the extent issues are not already addressed by existing provisions governing them However, the new provisions should never apply to a superannuation fund regulated under the *Superannuation Industry (Supervision) Act* 1993, and the "back end" provisions will only apply where a trustee or trust are insolvent. [2] (together, **Relevant Trusts**). The new provisions should have no practical impact on a trustee or trust which remains solvent, paying its debts as and when they fall due[3] – in the same way that the insolvency provisions in Chapter 5 of the *Corporations Act* do not impact on solvent companies. The key issue is to identify the trusts that the proposed laws should apply to without affecting the traditional asset holding/non-trading trusts. We have suggested consideration of the principles established for enterprises under the GST legislation (see footnote 1) as a starting point to separate out trading trusts, as it is a well-established precedent. There is no need to force Relevant Trusts to incorporate, or to alter the fact that Relevant Trusts do not have separate legal personality. Trust creation, existence, functioning and remedies should remain matters regulated by State and Territory laws (including the general law of trusts), except to the extent of any inconsistency with these new provisions. These provisions would also override any terms in a trust instrument dealing with the winding up of a Relevant Trust, to the extent of any inconsistency. In the discussion that follows, where relevant, "trustee" includes the responsible entity of a MIS and "trust instrument" includes a MIS constitution. ***Front-end reforms – a summary***

[2] See footnote 14 below.

[3] Definition of solvent in s95A of the *Corporations Act*.

Item	Corresponding part of the Corporations Act	Suggested components of new Chapter 5AA *Dealings with Relevant Trusts and their External Administration*
		1. Require Relevant Trusts to be registered with ASIC (unless already registered, or required to be registered, under the MIS provisions) and be given a unique numeric identifier, and oblige the trustee to use that identifier in all dealings in its capacity as trustee of that trust. 2. Require trustees of Relevant Trusts to disclose, and maintain as current, certain information about themselves and the Relevant Trust on a publicly searchable register maintained by ASIC. 3. To protect counterparties against the adverse effects of internal irregularities (including trustee misconduct), enact a series of statutory "indoor management" assumptions on which persons dealing with the trustee of a Relevant Trust may rely for protection. 4. Enact provisions that extend (or replicate) the benefit of "statutory transfer" of MIS assets and liabilities, as available under sections 601FS and 601FT of the *Corporations Act* for the replacement of responsible entities, to the replacement of trustees of all Relevant Trusts.[4] ***Back-end reforms – a summary*** 1. Include provisions that apply policies, principles and outcomes under Chapter 5 of the *Corporations Act* to Relevant Trusts. In particular, provide that: (a) the trust fund or estate of a Relevant Trust, being essentially the trust's assets and liabilities; and (b) its stakeholders, being the trust creditors and equity participants (ie beneficiaries/members),

[4] See the issues discussed with *Recommendation 5* on page 13 of Nuncio D'Angelo's Submission of 30 November 2022 to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into Corporate Insolvency in Australia (PJC Inquiry).

Item	Corresponding part of the Corporations Act	Suggested components of new Chapter 5AA *Dealings with Relevant Trusts and their External Administration*
		are dealt with in insolvency as if the fund or estate were a standalone economic (even though not legal) entity, separate from the trustee's personal estate and stakeholders, and those of any other trust estate held by it. [5] 2. Include provisions to deal with certain other trust-specific issues for Relevant Trusts. ***Interpretation*** Interpretation provisions would need to be included to ensure that the new Chapter 5AA prevails and overrides Chapter 5 in relevant circumstances. As a consequential change in relation to MIS, Part 5C.9 would be modified to avoid inconsistencies and overlaps.
2.	Chapter 2A *Registering a Company*	***Registration*** Provide for ASIC to establish and maintain a publicly searchable register of Relevant Trusts. Registration would be mandatory for trustees that carry on business in Australia, or otherwise voluntarily incur debts or liabilities in favour of external parties in Australia, in a trustee capacity (not being arrangements that are registered or required to be registered as MIS under Chapter 5C, ie double registration would not be required). It might be appropriate to include a lower-end threshold by reference to minimum value of annual turnover or debts/liabilities incurred to avoid imposing the burden on smaller arrangements. A failure to register if and when required could lead to personal liability for trust debts for the trustee and the trustee's directors (overriding any contractual limitations that might otherwise operate). It could also lead to the Relevant Trust being wound up by the Court (just as is the case with registrable but unregistered MIS: see section 601EE). It should *not* affect the trustee's indemnity out of trust assets or in any other indirect way "punish" creditors.

[5] This is consistent with how the Courts have been dealing with trusts where the trustee is wound up in insolvency, via the appointment of a receiver to the trust assets (See for example - Trustee with multiple trusts: *Donnelly (Liquidator), in the matter of Dunjey Property Pty Ltd (in liq)* [2023] FCA 1254, Trustee with one trust: *Sanderson, in the matter of Jabaluka Pty Ltd (in liq)* [2022] FCA 1012**)**

Item	Corresponding part of the Corporations Act	Suggested components of new Chapter 5AA *Dealings with Relevant Trusts and their External Administration*
		The registered trust would be given a unique numeric identifier (say, an Australian registered trust number or **ARTN**).[6] A person could, of course, hold multiple ARTNs if it is the trustee of multiple such trusts (just as a company may now be the responsible entity of multiple MIS and hold multiple ARSNs). The trustee would be obliged to use the ARTN in all documents and dealings by the trustee in the relevant capacity. The ARTN would also materially improve the position with respect to secured creditors of non-MIS trusts under the *Personal Property Securities Act 2009* (Cth) and the Personal Property Securities Register. The challenges facing those creditors, and those searching the Register, are well known.[7] The ARTN could be used as the unique identifier for such registrations. There should be initial and ongoing lodgement obligations on the trustee of a Relevant Trust to keep certain information on the public register to protect creditors when dealing with the Relevant Trust and in insolvency, and to underpin the suggested new statutory indoor management assumptions (see next point). This could include initial and annual director certifications that support certain of the statutory assumptions (see in particular assumptions (a) to (d) in the next point), but would *not* include lodging the trust instrument (unless it is a MIS, in which case section 601EA(4)(a) already requires lodgement of the constitution). [8]
3.	Chapter 2B.2 *Basic features of a company*	***Statutory "indoor management" assumptions for persons dealing with trustees of Relevant Trusts*** Under current trust law doctrine, internal irregularities in a trust (including trustee misconduct) can have catastrophic consequences for trust creditors in insolvency, even if they had no actual knowledge or notice of them at the time of transacting with the trustee. Some irregularities can be undiscoverable, and uncontrollable, by external parties, even after extensive due diligence and despite detailed transaction documentation. This

6 This would be so even if the trust already has an ABN; after all, a company can have both an ACN and an ABN – they serve different purposes. The *Personal Property Securities Act 2009* (Cth) would be amended to allow registration of security interests by reference to a Registered Trust's ARTN (as it currently does for ABNs of trusts and ARSNs for registered MIS).

7 The issues are briefly canvassed in the Final Report of the 2015 statutory review of the Personal Property Securities Act 2009 (the "Whittaker Review") (see paragraph 6.7.4) and discussion materials released by the Attorney General on proposed reform of the Act and Regulations: see https://consultations.ag.gov.au/legal-system/government-response-to-pps-review.

8 See the issues discussed with *Recommendation 1* on page 9 of Nuncio D'Angelo's Submission of 30 November 2022.

Item	Corresponding part of the Corporations Act	Suggested components of new Chapter 5AA *Dealings with Relevant Trusts and their External Administration*
		has the effect of imposing risks and consequences on innocent "outsiders" that should properly be borne by the trust's "insiders". [9] Parliament should, enact robust statutory "indoor management" assumptions for the benefit of external parties dealing with the trustee of a Relevant Trust (ie *not* being beneficiaries/members of the trust), similar in conception and effect to those in Part 2B.2 of the Act that are available to parties dealing with companies in their own right (see particularly sections 128 and 129), but modified to address issues specific to the trust form. This would shift the risks posed by internal irregularities and trustee misconduct away from innocent outsiders and back to the trustee and beneficiaries, just as the current corporate assumptions shift the risks of internal irregularities and director/officer misconduct away from innocent outsiders and back to the company. Some of the types of irregularity and misconduct that can lead to adverse outcomes for innocent trust counterparties include the matters addressed in the following suggested assumptions (this is not necessarily an exhaustive list): A person is entitled to make the following assumptions in relation to dealings with the trustee of a Relevant Trust acting in that capacity: (a) a Relevant Trust that is held out by or on behalf of a person claiming to be its trustee, having the name and ARTN (or ARSN) shown on the ASIC register, is properly formed and exists as a trust; (b) the person shown on the ASIC register as the trustee of the Relevant Trust has been duly appointed, has not been removed or replaced, and is the only trustee of the Relevant Trust; (c) there are no former trustees of the Relevant Trust who have, in that capacity, an undischarged claim against the trustee or with respect to the property of that trust; (d) the Relevant Trust is governed by a written instrument that satisfies all formal and legal requirements for efficacy and enforceability, and is enforceable, as a trust instrument under the laws of a State or Territory of Australia, is duly executed and has been duly stamped (and, in the

[9] The issues (including the risks to and consequences for trust creditors) are discussed in Attachment #2 to Nuncio D'Angelo's Submission of 30 November 2022 to the PJC Inquiry.

Item	Corresponding part of the Corporations Act	Suggested components of new Chapter 5AA *Dealings with Relevant Trusts and their External Administration*
		case of a constitution of a MIS, complies in all respects with the requirements of Chapter 5C of the Act); (e) if the trustee of a Relevant Trust, or a person on its behalf, gives a person an original or copy of the trust instrument (and any amendments and supplements) in connection with a dealing, that original or copy (as so amended and supplemented) discloses all the terms of the Relevant Trust other than those implied by law; (f) all provisions of the trust instrument have been complied with and the trustee has not committed a breach of trust; (g) the trustee has the trust power under the Relevant Trust to enter into and perform obligations in connection with the dealing as trustee; (h) the dealing is authorised and is in all respects a proper exercise by the trustee of its trust powers under the Relevant Trust, and does not cause or result in a breach of trust; (i) the trustee has the right to be indemnified in full out of Relevant Trust property for any debts and liabilities it incurs as trustee of the Relevant Trust in connection with the dealing; (j) the trustee's personal liability for any debts and liabilities it incurs as trustee of the Relevant Trust in connection with the dealing is not limited (including to its ability to discharge them out of the Relevant Trust property) except if and to the extent agreed with the counterparty to the dealing who is otherwise entitled to make this assumption; (k) if the Relevant Trust is not registered as a MIS, it is not required to be so registered; and (l) if the Relevant Trust is a registered MIS, it satisfies all of the formal requirements of Chapter 5C, and neither the responsible entity nor its directors or officers are in breach of their duties and obligations under that Chapter generally or in the responsible entity entering into and performing obligations in connection with the dealing. To maintain parity with the corporate statutory assumptions: • neither the trustee nor any beneficiary/member of the Relevant Trust would be entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect: see section 128(1);

Item	Corresponding part of the Corporations Act	Suggested components of new Chapter 5AA *Dealings with Relevant Trusts and their External Administration*
		• a person would be entitled to make these assumptions in relation to dealings with another person who has, or purports to have, directly or indirectly acquired trust property from the trustee of a Relevant Trust. Neither the trustee nor that other person nor any beneficiary/member of the Relevant Trust would be entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect: see section 128(2); • the assumptions may be made even if the trustee or an officer or agent of the trustee acts fraudulently, or forges a document, in connection with the dealings: see section 128(3); and • a person would not be entitled to make any of these assumptions if at the time of the dealing they knew or suspected that the assumption was incorrect: see section 128(4). To achieve maximum risk alignment with parties dealing with companies acting in their own right, this regime would be expressly stated to be exclusive or exhaustive in relation to Relevant Trusts, so as to fully displace the equitable doctrines that disentitle a trust counterparty from asserting a direct or indirect claim against trust property (including in insolvency) at a much lower threshold of knowledge or notice (and even in some cases where they have no knowledge or notice) of internal irregularities or trustee misconduct.[10]
4.	Chapter 2B.6 *Names*	These provisions should be applied also to the names and unique numeric identifiers of registered Relevant Trusts.
5.	Chapter 2C *Registers*	These provisions should be applied also to the register of Relevant Trusts.
6.	Chapter 5 *External administration*	***Application of Chapter 5 policies, principles and outcomes to Relevant Trusts*** Because the trust, as an economic entity, is so fundamentally different from a company (not least because it is not a separate legal entity), it is necessary to enact provisions, taking into account those differences, that yield the same or equivalent stakeholder outcomes in the insolvency of a Relevant Trust as those that result in a corporate insolvency under Chapter 5 of the Act, based on the same policy prescriptions regarding solvency, external administration, priority, ranking, voidable transactions, distributions, etc. Some of this may be done by cross-

[10] As to which, see N D'Angelo, *Transacting with Trusts and Trustees* (LexisNexis Butterworths Australia, 2020), at 5.14 to 5.96.

Item	Corresponding part of the Corporations Act	Suggested components of new Chapter 5AA *Dealings with Relevant Trusts and their External Administration*
		referencing relevant parts of Chapter 5 (or replicating them with necessary changes),[11] but some new provisions will be needed. In particular, the provisions would recognise and deal with the trust fund or estate of a Relevant Trust as a separate economic (even though not legal) entity, with its own assets, liabilities, creditors and equity participants (ie beneficiaries/members), separate and distinct from those of the trustee personally and any of other trust estate held by that trustee. Among other things, this would ensure that: (a) the assets of a Relevant Trust are *only* used to pay creditors of *that* Relevant Trust and not the personal creditors of the trustee, or the creditors of any other trust; (b) the claims of creditors of a Relevant Trust are properly ranked *inter se* in the same way as creditors of a company, with the order of priority and distribution in liquidation of a Relevant Trust following the scheme that operates in relation to companies; and (c) any residue after the discharge of all of a Relevant Trust's debts is distributed to the beneficiaries/members of the Relevant Trust and not to the trustee or its shareholders.[12] For efficiency, the same insolvency official could act concurrently in multiple capacities, ie in respect of the company personally and in respect of each Relevant Trust of which it was trustee (this may require provisions dealing with potential conflicts). An early task for a liquidator appointed to an insolvent trustee or Relevant Trust would be an exercise in taking accounts and allocating assets and liabilities to the trustee's personal estate and to the estate of each trust of which the trustee was trustee. In this, the liquidator would be given certain leeway to exercise discretions in good faith to deal with poor record-keeping etc by the trustee (subject to the Court's power to make a different determination on challenge by any affected stakeholder). The assets of a Relevant Trust would include any recoveries under section 588FF (eg unfair preferences and other voidable transactions) if and to the extent the original transaction or conduct was entered into by the trustee in its capacity (or purportedly in its capacity) as trustee of that Relevant Trust.

11 For example, note how the related party transactions regime in Chapter 2E of the *Corporations Act* is incorporated into Chapter 5C so as to apply to MIS, by Part 5C.7 of the Act.

12 Among other things, this would deal with the difficulties caused by the interpretation given to the expression "property of the company" by the High Court in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* [2019] HCA 20 (as to which, see the submission of Dr Allison Silink, being Submission No. 76 on the PJC Inquiry's website).

Item	Corresponding part of the Corporations Act	Suggested components of new Chapter 5AA *Dealings with Relevant Trusts and their External Administration*
		Any debts of a Relevant Trust that could not be discharged out of the assets of that trust would become personal debts of the trustee, to be discharged out of the trustee's personal assets, *pari passu* with all its other personal debts in accordance with the existing provisions of Chapter 5.[13] There would be provisions clarifying that the liquidator's remuneration, costs, expenses and disbursements are to be allocated across the personal and trust estates in accordance with the principles established in *Water v Widdows* [1984] VR 503 and confirmed in *Re CMI* [2015] QSC 96. These cases establish that remuneration directly related to establishing the fund are applied to the fund and general costs are allocated proportionately across the funds based on realisations within the funds. These amounts can be determined by the liquidator in good faith and without need for a Court order (subject to the Court's power to make a different determination on challenge by any affected stakeholder). ***Additional trust-specific changes*** In addition, new provisions should be included to deal with certain trust-specific issues for Relevant Trusts, for example (and this is not an exhaustive list): (a) *an "insolvent" Relevant Trust estate*: although a trust does not have separate legal personality, it is economically possible for a trust fund or estate to become "insolvent" without the trustee itself also being insolvent.[14] The law should permit the estate of a Relevant Trust to be placed into a form of external administration (including voluntary administration and liquidation) even if the trustee itself is not insolvent. For example:

13 Subject, in the case of some creditors, to any agreed trustee limitation of liability clause, as to which, see generally Chapter 3 (*Trustee limitation of liability clauses*) of *Transacting with Trusts and Trustees* (footnote 10).

14 For a suggested definition of when a trust (or trust fund or estate) may be said to be "insolvent" see *Transacting with Trusts and Trustees* (footnote 10), at 10.89. In summary, and reflecting the definition in section 95A of the *Corporations Act* for companies, a trust can be said to be solvent if, and only if, the trustee is able to pay all trust debts as and when they become due and payable out of trust assets and (where it is obliged to do so) its own assets; a trust that is not solvent in this sense can be said to be insolvent. A debt of a trustee is a "trust debt" of a trust if the trustee is entitled to apply the assets of that trust to pay it (even if it is also obliged to pay it out of its own assets), disregarding for the purposes of this definition any application of the clear accounts rule. A trustee may remain solvent while a trust under its control is "insolvent" if the trustee is protected from personal liability for trust debts by trustee limitation of liability clauses in all or most of its contracts: see *Transacting with Trusts and Trustees* (footnote 10) at 10.94 and following. The use of these clauses is very common in Australian commerce among professional trustee companies and other well-advised trustees: see generally Chapter 3 (*Trustee limitation of liability clauses*) of *Transacting with Trusts and Trustees* (footnote 10). It is acknowledged that the suggestion in this paragraph (a) may be seen by some as somewhat radical and would need to be tested thoroughly in consultation via an exposure draft bill.

Item	Corresponding part of the Corporations Act	Suggested components of new Chapter 5AA *Dealings with Relevant Trusts and their External Administration*
		(i) a solvent trustee should be able to resolve to place an insolvent trust estate into voluntary administration or liquidation (and there should be incentives for it to do so, and/or personal sanctions for itself and its directors for failing to do so); and (ii) creditors of an insolvent Relevant Trust should be able to force that trust into liquidation. In either case, creditors of a Relevant Trust that has become insolvent should not have to wait (as they do under current law) until the trustee itself becomes insolvent (if ever) before the trust assets and liabilities are taken out of the control of the trustee and placed into the hands of insolvency practitioners (with them deemed to be appointed as replacement trustees for that purpose, with suitable limits on personal liability for antecedent debts and liabilities); (b) *"trustee ejection" clauses*: override or control "trustee ejection" clauses in trust instruments for Relevant Trusts, ie provisions that automatically remove (or give the beneficiaries or other person the power to remove) a trustee that is insolvent or subject to any form of external administration; (c) *trustee's indemnity*: in a liquidation of a Relevant Trust, preserve and protect, for the benefit of unpaid trust creditors, the full value of the exoneration limb of the trustee's indemnity against Relevant Trust property, despite the terms of the trust instrument or any internal irregularity or trustee misconduct that might have otherwise impaired it (this would include disengaging or overriding the effect of the "clear accounts rule" with respect to creditors). This could be seen as an expansion and enhancement of section 601FH of the Act that applies in relation to MIS. However, creditors who are disentitled from relying on the new statutory assumptions discussed above might not enjoy this protection in relevant circumstances; (d) *insolvency officials' powers*: ensure that receivers, administrators and liquidators of a trustee (or of a Relevant Trust estate) are given plenary statutory powers to deal with trust assets and liabilities, unaffected by the terms of the trust instrument or any pre-appointment conduct of the trustee, and without requiring an application to any Court; (e) *ranking of trust creditors*: the general *pari passu* rule in section 555 should apply to and among all creditors of a Relevant Trust, subject to the statutory priorities under section 556, as applicable to the trust. In particular, it should be made clear that unsecured creditors whose claims arise from dealings with a former trustee enjoy *pari passu* ranking with creditors whose claims arise from dealings with the current trustee

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		(which will require that all present and former trustees' indemnity claims in relation to those debts must themselves rank *pari passu*);[15] (f) *"substantial security" in voluntary administration*: if, as suggested above, a Relevant Trust can be placed into voluntary administration, then the advantages currently available to a secured creditor of having "substantial security" (ie security over the whole or substantially the whole of the property of a company) should accrue to someone who deals with a trustee of a Relevant Trust and who holds security over the whole or substantially the whole of the property of the Relevant Trust;[16] (g) *exclude trust assets from "substantial security" test:* the test for whether a creditor holds security over the whole or substantially the whole of a company's property for the purposes of the voluntary administration provisions should exclude from the calculation the company's interests in all assets held on trust (with exception for an interest in trust assets arising from the trustee's indemnity claim for reimbursement or recoupment of trust debts and liabilities that it has discharged with its own money, which interest is properly regarded as personal to the trustee and not held on trust); (h) *modify directors' duties and liabilities*: for corporate trustees of Relevant Trusts, modify directors' duties to more fully and properly protect trust creditors by: (i) extending directors' personal liability for insolvent trading under sections 197 and 588G of the Act so that liability attaches if the fund or estate of the Relevant Trust is insolvent, even if the trustee itself remains solvent;[17] and (ii) extending the director's common law duty to take into account the interests of creditors when a company is in the zone of insolvency to include a duty to take into account the interest of *trust* creditors when the Relevant Trust is in the zone of insolvency, even if the trustee itself is not;[18]

15 This addresses the "third issue" discussed by the Privy Council in *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36. The *Halabi* decision, which held that indemnity claims of successive trustees rank *pari passu*, is directly contrary to the weight of Australian authority, which maintains that they rank in accordance with the general equitable princple of "first in time prevails if the equities are equal": see most recently *Francis (Trustee) in the matter of Fotios (Bankrupt) v Helios Corporation (No 3)* [2023] FCA 251. This effectively places creditors of a successor trustee at a disadvantage vis-a-vis any undischarged creditors of a former trustee in a trust insolvency.

16 See the issues discussed with *Recommendation 2* on page 10 of Nuncio D'Angelo's Submission of 30 November 2022 to the PJC Inquiry.

17 See the issues discussed with *Recommendation 7* on pages 14 - 16 of Nuncio D'Angelo's Submission of 30 November 2022 to the PJC Inquiry (and see footnote 14).

18 See footnote 14.

Item	Corresponding part of the Corporations Act	Suggested components of new Chapter 5AA *Dealings with Relevant Trusts and their External Administration*
		(i) *limited liability for beneficiaries*: enact statutory limited liability for beneficiaries/members of Relevant Trusts, similar to that for shareholders of companies;[19] (j) *perpetuities*: abolish the rules against perpetuities and remoteness of vesting for Relevant Trusts;[20] (k) *Court powers*: include a provision analogous to the useful section 447A (which appears in in Part 5.3A in relation to voluntary administration) by which the Court can make such orders as it considers appropriate as to how these provisions are to operate in respect of any particular Relevant Trust;[21] and (l) *solvent trusts*: there needs to be provisions to deal with "solvent" trusts when an insolvent trustee is placed into external administration. The external administrator needs to be empowered to find a new trustee for the "solvent" trust, move the "solvent" trust from external administration and replace the insolvent trustee.

19 See the issues discussed with *Recommendation 8* on page 16 of Nuncio D'Angelo's Submission of 30 November 2022 to the PJC Inquiry.

20 See the issues discussed with *Recommendation 6* on page 14 of Nuncio D'Angelo's Submission of 30 November 2022 to the PJC Inquiry.

21 This would be in addition to and not instead of the general right available to all trustees and their representatives to seek advice and direction from the Court under section 63 of the *Trustee Act 1925* (NSW) and equivalents elsewhere.