

CPD-LIVE 2019  
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## IPSO FACTO REFORMS

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### SPEAKER BIO

Sally Whiteman, Barrister – Sally’s principal practice areas are commercial, consumer, employment, regulatory and criminal law. Sally maintains a broad civil and commercial litigation practice. Sally acts in private consumer litigation as well as consumer prosecutions. She acts as prosecutor for Consumer Affairs Victoria and is a panel lawyer for the Consumer Action Law Centre.

Sally provides advice and advocacy in respect to employment matters. She is also experienced in running workshops on employment and industrial relations law, practice and procedure.

Sally has experience in regulatory and criminal matters both as prosecutor and on behalf of defendants. She has particular experience in respect of matters concerning corporate and white-collar crime, proceeds of crime, compensation under the Sentencing Act 1991, taxation administration offences, building offences, estate agent offences. Sally accepts briefs in defamation law. She regularly assists Arts Law Centre of Australia in this regard.

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## LEARNING OUTCOMES

- Analyse the stay provisions in respect of Ipsos Facto Clauses
- Discuss exceptions to the Reforms
- Offer some practical guidance

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INTRODUCTION

- What has changed?
- What is an ipso facto clause?




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CONTEXT OF REFORMS

- *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017 (Ch)*
- *Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017, 25 – 26:*

"An ipso facto clause creates a contractual right that allows one party to terminate or modify the operation of a contract upon the occurrence of some specific event. In the current insolvency context, such rights may allow one party to terminate or modify the contract solely due to the financial position of the company (including insolvency) or due to the commencement of formal insolvency proceedings, such as on the appointment of an administrator. This type of termination can occur regardless of the counterparty's continued performance of its obligations under the contract."




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CONTEXT OF REFORMS

- *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017 (Ch)*
- *Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017, 25 – 26:*

"The aim is to allow breathing space for a company to continue to trade during a formal restructure. This may also improve the position for directors of companies facing severe financial hardship when entering into early negotiation with their creditors about pursuing a restructure (including under the safe harbour provisions) as they will know that future entry into formal insolvency will not necessarily trigger an ipso facto clause. This will assist in protecting asset values for the benefit of the company, its employees and its creditors which in turn will assist to promote a culture of entrepreneurship and reduce the stigma of failure."




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OVERVIEW OF THE IPSO FACTO REFORMS

- Source of law
- The stay
- Events
- Period of the stay
- Exempt contracts, agreements and arrangements
- Exempt rights
- Commencement of reforms
- Powers of the court
- Anti-avoidance provisions
- Consent
- Self-executing provisions
- Practical guidance




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SOURCE OF LAW

- Corporations Act 2001 (Cth): ss 415D - 415G; 434J - 434M and 451E - 451H.
- Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017 (Cth)
- Corporations Amendment (Stay on Enforcing Certain Rights) Regulations (No.2) 2018 (Cth)
- The Corporations (Stay on Enforcing Certain Rights) Declaration 2018 (Cth)




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THE STAY

451E. Stay on enforcing rights merely because the company is under administration etc.

*Stay on enforcing rights*

(1) A right cannot be enforced against a company for:

- (a) the reason that the company has come or is under administration; or
- (b) the company's financial position, if the company is under administration; or
- (c) a reason, prescribed by the regulations for the purposes of this paragraph, that relates to:
  - (i) the company coming, or possibly coming, under administration; or
  - (ii) the company's financial position; or
  - (iii) the company later comes under administration; or
  - (d) a reason that, in substance, is contrary to this subsection; or
  - (e) a reason that, in substance, is contrary to this subsection; if the right arises for that reason by express provision (however described) of a contract, agreement or arrangement.

*Note:* This result is subject to subsection (5) and (7), and to any order under section 451F.

*Example:* A right to terminate a contract will not be enforceable to the extent that those rights are triggered by the company coming under administration.




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EVENTS

- Scheme of Arrangement: s 415D(1) CA
- Administration: s 451E(1) CA
- Managing Controller: s 434J(1) CA




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EVENTS 415D Stay on enforcing rights merely because of a proceeding under this Part etc.

*Stay on enforcing rights*

(1) A right cannot be enforced against a body for:

- (a) the reason that the body, if it is a disclosing entity, has publicly announced that it will be making an application under section 411 for the purpose of avoiding being wound up in insolvency; or
- (b) the reason that the body is the subject of an application under section 411; or
- (c) the reason that the body is the subject of a compromise or arrangement approved under this Part as a result of an application under section 411; or
- (d) the body's financial position, if the body is the subject of such an announcement, application, compromise or arrangement; or
- (e) a reason, prescribed by the regulations for the purposes of this paragraph, that relates to:
  - (i) the making, or possible making, of such an announcement, application, compromise or arrangement about the body; or
  - (ii) the body's financial position;
 if such an announcement, application, compromise or arrangement is later made about the body; or
- (f) a reason that, in substance, is contrary to this subsection; or
- (g) a reason that, in substance, is contrary to this subsection, if the right arises for that reason by express provision (however described) of a contract, agreement or arrangement.




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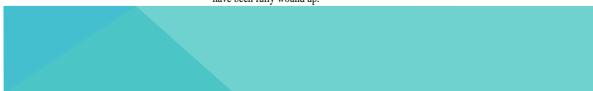
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STAY PERIOD - ADMINISTRATION S 451E

*Period of the stay*

- (2) The right cannot be enforced as described in subsection (1) during the period (the *stay period*) starting when the company comes under administration and ending at the latest of the following:
- (a) when the administration ends;
  - (b) if one or more orders are made under subsection (3) for the company as the result of an application made before the administration ends—when the last made of those orders ceases to be in force;
  - (c) if the administration ends because of a resolution or order for the company to be wound up—when the company's affairs have been fully wound up.




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STAY PERIOD – SCHEME OF ARRANGEMENT S 415D

(2)The right cannot be enforced as described in subsection (1) during the period (the *stay period*) that:

- (a) starts:
  - (i) if the body makes an announcement referred to in paragraph (1)(a)—when the announcement is made; or
  - (ii) otherwise—when the application under section 411 is made; and
- (b) ends:
  - (i) if the body makes an announcement referred to in paragraph (1)(a), and fails to make the announced application within the next 3 months or within any period ordered under subsection (3) for the body—at the end of the longer of those periods; or
  - (ii) when the application under section 411 is withdrawn or when the Court dismisses the application; or
  - (iii) unless subparagraph (iv) applies—at the end of any compromise or arrangement approved under this Part as a result of the application under section 411; or
  - (iv) if such a compromise or arrangement ends because of a resolution or order for the body to be wound up—when the body's affairs have been fully wound up.

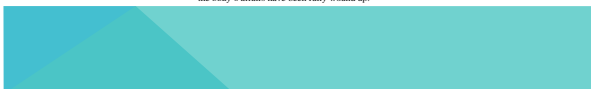


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STAY PERIOD – MANAGING CONTROLLER S 434J

(2)The right cannot be enforced as described in subsection (1) during the period (the *stay period*) that:

- (a) starts:
  - (i) if the body makes an announcement referred to in paragraph (1)(a)—when the announcement is made; or
  - (ii) otherwise—when the application under section 411 is made; and
- (b) ends:
  - (i) if the body makes an announcement referred to in paragraph (1)(a), and fails to make the announced application within the next 3 months or within any period ordered under subsection (3) for the body—at the end of the longer of those periods; or
  - (ii) when the application under section 411 is withdrawn or when the Court dismisses the application; or
  - (iii) unless subparagraph (iv) applies—at the end of any compromise or arrangement approved under this Part as a result of the application under section 411; or
  - (iv) if such a compromise or arrangement ends because of a resolution or order for the body to be wound up—when the body's affairs have been fully wound up.



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POWER OF THE COURT TO EXTEND STAY PERIOD

- if the Court is satisfied that the extension is appropriate having regard to the interests of justice: Corporations Act, ss 415D(3), 451E(3)(a) and s 434J(3)(a)
- 'Administration' and 'Managing Controller' events: the Court, before deciding an application for an order extending the stay, may grant an interim order, but must not require the applicant to give an undertaking as to damages as a condition for doing so. Corporations Act, ss 451E(3)(b) and s 434J(3)(b).



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INDEFINITE STAY

*Enforcing rights after the stay for reasons relating to earlier circumstances*

- (4) The right is unenforceable against the company indefinitely after the end of the stay period to the extent that a reason for seeking to enforce the right:
  - (a) is the company's financial position before the end of the stay period; or
  - (b) is the company having come or been under administration before the end of the stay period; or
  - (c) is a reason, prescribed by the regulations for the purposes of this paragraph, relating to circumstances in existence during the stay period; or
  - (d) is a reason referred to in paragraph (1)(c) or (d).



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EXEMPT CONTRACTS, AGREEMENTS OR ARRANGEMENTS

- **Corporations Regulations 2001, r 5.3A.50(2) / Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018**
- Government licenses, permits and approvals
- Contracts relating to Australia's national security, border protection or defence capability;
- Contracts for supply to a public hospital or public health service;
- Contracts for supply by or on behalf of a public hospital or a public health service;
- Contracts for the supply of essential or critical goods or services to, or the carrying out of essential or critical works for, the government or the public on behalf of the government;
- Arrangements in respect of securities and financial products as well as the management of financial investments;
- Arrangements involving a special purpose vehicle;
- Contracts for the sale of all or part of a business, including by way of the sale of securities or financial products;
- Novations, variations and assignments;
- Contracts for building works over \$1 billion.



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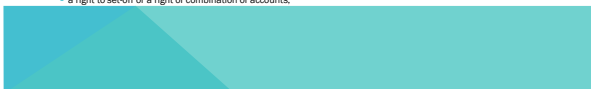
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EXEMPT RIGHTS

- **The Corporations (Stay on Enforcing Certain Rights) Declaration 2018 (Cth) (Declaration)**
- **See also Corporations Act ss 415D(5)(a); 451E(5)(a); 434J(5)(a).**

In summary, the exempt rights include:

- Rights arising under contract entered into after the formal restructure event has occurred;
- rights relation to finance arrangements;
- a right to payment by way of indemnity in respect of:
  - liability/loss arising from a person enforcing rights
  - charges and expenses incurred by a person in preserving or enforcing rights;
- termination rights under standstill or forbearance arrangements;
- a right to change the priority or order in which amounts are to be paid or received under a contract;
- a right to set-off or a right of combination of accounts;



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EXEMPT RIGHTS

- The Corporations (Stay on Enforcing Certain Rights) Declaration 2018 (Ctd) (Declaration)
- See also Corporations Act ss 415D(5)(a); 451E(5)(a); 434(5)(a).

In summary, the exempt rights include (continued)

- a right to net balances or other amounts;
- a right to take account to enforce rights of set-off and netting;
- a right to assign or transfer rights or obligations or novate rights or obligations;
- a right (or property that is subject to a circulating security interest to become subject to a non-circulating security interest;
- a right for a floating charge over property to operate as a fixed charge; or
- a right for property consisting of accounts or chattel paper to be transferred to a secured party by way of security;




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RELEVANT DATES - COMMENCEMENT OF THE STAY

- Reforms commenced 1 July 2018
- Amendments, variations and novations - commencement 1 July 2023
- High value building works (\$1 billion threshold) - commencement 1 July 2023.




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CONSENT - ADMINISTRATION S 451E

(7)Subsection (1) does not apply to the right to the extent that:

- (a) the administrator of the company; or
- (b) if a liquidator of the company is appointed after the administration ends—the liquidator;

has consented in writing to the enforcement of the right.




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CONSENT - SCHEME OF ARRANGEMENT S 415

- (8) If the application under section 411 results in the approval under this Part of a compromise or arrangement, subsection (1) does not apply to the right to the extent that:
  - (a) the person appointed to administer the compromise or arrangement; or
  - (b) if a liquidator of the body is appointed after the start of the stay period—the liquidator; has consented in writing to the enforcement of the right.




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CONSENT - MANAGING CONTROLLER S 434J

- (7) Subsection (1) does not apply to the right to the extent that the managing controller has consented in writing to the enforcement of the right.




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POWERS OF THE COURT

- Extent stay
- Lift stay
- Order that rights be exercised only with leave of the Court




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LIFTING THE STAY - MANAGING CONTROLLER S 434K

434K Lifting the stay

- (1) The Court may order that subsection 434J(1) does not apply for one or more rights against a corporation if the Court is satisfied that this is appropriate in the interests of justice.
- (2) An application for the order may be made by the holder of those rights.




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LIFTING THE STAY - SCHEME OF ARRANGEMENT S 415E

415E Lifting the stay

- (1) The Court may order that subsection 415D(1) does not apply for one or more rights against a body if the Court is satisfied:
  - (a) that the relevant compromise or arrangement:
    - (i) to be applied for; or
    - (ii) applied for; or
    - (iii) approved;
 under this Part is not for the purpose of the body avoiding being wound up in insolvency; or
    - (b) that this is appropriate in the interests of justice.
- (2) The order may also provide that the holder of those rights may choose to enforce those rights from the earlier of:
  - (a) the day any announcement referred to in paragraph 415D(1)(a) was made by the body; and
  - (b) the day any application under section 411 was made for the compromise or arrangement.
- (3) An application for the order may be made by the holder of those rights.




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LIFTING THE STAY - ADMINISTRATION S 451F

451F Lifting the stay

- (1) The Court may order that subsection 451E(1) does not apply for one or more rights against a company if the Court is satisfied that this is appropriate in the interests of justice.
- (2) An application for the order may be made by the holder of those rights.




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ORDER FOR RIGHTS TO BE ENFORCEABLE ONLY WITH LEAVE

451G Order for rights to be enforceable only with leave of the Court

Orders

- (1) The Court may order that one or more rights under a contract, agreement or arrangement are enforceable against a company only:
  - (a) with the leave of the Court; and
  - (b) in accordance with such terms (if any) as the Court imposes.

Example: The order could be sought for a right to terminate for convenience.

- (2) The Court may make the order if:
  - (a) the company is under administration; and
  - (b) the Court is satisfied that:
    - (i) the rights are being exercised; or
    - (ii) the rights are likely to be exercised; or
    - (iii) there is a threat to exercise the rights; because of one or more reasons referred to in paragraphs 451E(1)(a) to (d); and
    - (c) an application for the order is made by the administrator of the company.
- (3) An order under subsection (1) must specify the period for which it applies. In working out the period, the Court must have regard to:
  - (a) subsections 451E(2), (3) and (4); and
  - (b) the interests of justice.

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ANTI-AVOIDANCE MECHANISMS

- Anti-avoidance provisions
- Order that rights cannot be enforced without leave
- Regulation-making powers
- Drafting of stay

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SELF-EXECUTING PROVISIONS

*self-executing provision* means a provision of a contract, agreement or arrangement that can start to apply automatically:

- (a) for one or more reasons; and
- (b) without any party to the contract, agreement or arrangement making a decision that the provision should start to apply.

ss 451FA, 451GA, 434LA

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PRACTICAL GUIDANCE

- \* training persons managing or administering contracts;
- \* creating approval processes for terminating contracts;
- \* reviewing contracts which may fall within scope of the reforms;
- \* reviewing due diligence processes.




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