INSOL International

Module 8F

Guidance Text

New Zealand

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INSOL INTERNATIONAL
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CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

INSOL International

6-7 Queen Street, London, EC4N 1SP, UK
Tel: +44 (0)20 7248 3333
Fax: +44 (0)20 7248 3384

www.insol.org

Module Author

Lynne Van
Special Counsel
Anthony Harper
Auckland
New Zealand

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN NEW ZEALAND

Welcome to **Module 8F**, dealing with the insolvency system of **New Zealand**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of New Zealand's insolvency laws;
- a relatively detailed overview of New Zealand's insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of New Zealand.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST on 31 July 2021**. Please consult the web pages for the Foundation Certificate in International Insolvency Law for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2021 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law on the INSOL International website.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in New Zealand:

- the background and historical development of insolvency law in New Zealand;
- the various pieces of primary and secondary legislation governing New Zealand insolvency law;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;
- the rules of international insolvency law as they apply in New Zealand;
- the rules relating to the recognition of foreign judgments in New Zealand.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of New Zealand insolvency law; and
- be able to answer questions based on a set of facts relating to New Zealand insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. AN INTRODUCTION TO NEW ZEALAND

New Zealand is commonwealth nation located in the Asia Pacific region, East of Australia. New Zealand has a population of approximately five million.

New Zealand is a constitutional monarchy with a parliamentary democracy. Parliament comprises of the Head of State and the House of Representatives, who are democratically elected. The Head of Government is the Prime Minister. Parliament is the legislative arm of the country and is modelled on the Westminster System. Originally bicameral, New Zealand's Parliament is now unicameral. The Head of State is Her Majesty, Queen Elizabeth II.

New Zealand is a trade dependent country. As at December 2017, annual exports were valued at NZD 53.7 billion and imports were valued at NZD 56.5 billion. Its Gross Domestic Product (GDP) in the same period was USD 205 billion, with a GDP per capita of USD 41,945. New Zealand's key export is agricultural goods (dairy, meat, wine, fisheries). It is also reliant on its tourism sector. New Zealand's top three trading partners are China, Australia and the United States, with Australia being its biggest services trade partner. 21% of New Zealand's service exports are to Australia and services imports make up 29.4%.[1]

In 2019, statistics New Zealand recorded a total of 546,735 enterprises in New Zealand.[2] Small- and medium-sized enterprises (SMEs) make up almost 99% of businesses in New Zealand,[3] with small businesses making up 97% of all enterprises,[4] employing 29% of the workforce in New Zealand and contributing 26% to the GDP.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Introduction

New Zealand's legal system is influenced by its history. The indigenous people of New Zealand are known as the Māori. Up until 1840, Māori customary law (*tikanga*) was the prevailing source of law. Following the signing of the Treaty of Waitangi in

1 https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-australia-closer-economic-relations-cer/.
2 https://www.stats.govt.nz/information-releases/new-zealand-business-demography-statistics-at-february-2019.
3 https://www.grantthornton.co.nz/globalassets/1.-member-firms/new-zealand/pdfs/gtnz-msb-2019-pr.pdf.
4 Businesses that employ 20 people or less.

1840 and the declaration of British sovereignty, English law has since been incorporated into the New Zealand legal system. The two primary sources of law in New Zealand are therefore statute (Parliament) and common law (law developed by the judiciary).

Like other commonwealth countries, the judiciary in New Zealand is independent of both Parliament and the Executive. Independent, fair and efficient processes underpin the court system.

New Zealand does not have a written / codified constitution. Constitutional issues are addressed through statute, judicial decisions and constitutional conventions. The Treaty of Waitangi plays an important role in the New Zealand legal system and has particular relevance in terms of land interests, affecting claims in insolvency.

4.2 The origins of New Zealand's insolvency laws and framework

4.2.1 Personal insolvency

New Zealand's insolvency regime has its origins in the law of personal insolvency of England. Like the English system, New Zealand's insolvency regime is primarily based on a collective process, both in the area of personal and corporate insolvency.

The first insolvency statute in New Zealand was the Debtors and Creditors Act 1862, repealing the Imprisonment for Debt Ordinance 1844 and its amendments. More detailed provisions were enacted in the Bankruptcy Acts of 1867, 1892 and 1908. This was modelled on the legislative regime in the United Kingdom. Further reforms were made in the enacted in the Insolvency Act 1967. Personal insolvency in New Zealand is currently governed by the Insolvency Act 2006 (Insolvency Act).

4.2.2 Corporate insolvency

Similar to personal insolvency legislation, New Zealand's corporate regime is modelled on legislation from the United Kingdom.[5] Early corporate legislation made provision for corporate liquidation and basic rehabilitation processes. All subsequent corporate legislation[6] has similar provisions. The Companies Act 1993 (Companies Act), is the primary legislation governing corporate insolvency. The Insolvency Act 1967 also played a role in corporate legislation (a position which remains unchanged to this day).

The New Zealand corporate regime was largely unamended until the late 1990s. During this period, New Zealand conducted its first comprehensive review of its insolvency law and processes.[7] The Law Commission's Report identified a number of objectives for the review, including to provide a predictable and simple regime for financial failure that could be administered quickly and efficiently with minimal regulatory and other associated costs, provide a regime for distribution of proceeds to creditors in accordance with their relative pre-insolvency entitlements and to maximise the returns to creditors by providing flexible and effective methods of insolvency administration and enforcement which encourage early intervention when financial distress becomes apparent. Since the 1999 review, a number of amendments have been made, incorporating processes such as the voluntary

5 Joint Stock Companies Act 1860, based on Joint Stock Companies Act 1856 (UK) and Companies Act 1882.
6 Companies Acts 1903, 1908, 1933, 1955.
7 Law Commission's report to the Ministry of Economic Development, *Insolvency Law Reform: Promoting Trust and Confidence An Advisory Report to the Ministry of Economic Development*, available at https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20SP11.pdf.

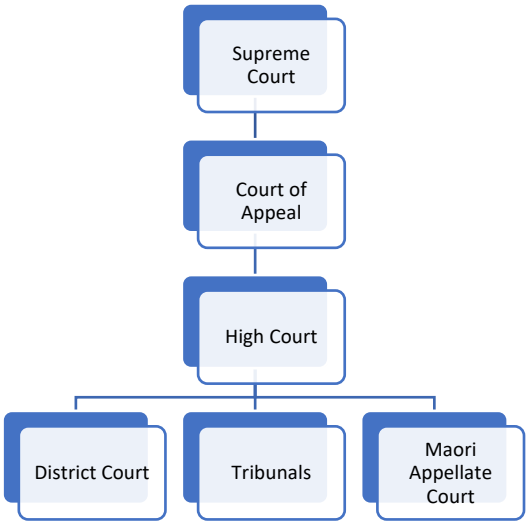
administration regime and the UNCITRAL[8] Model Law on Cross-Border Insolvency regarding cross-border insolvency.

New Zealand has retained terminology from the UK, maintaining a distinction between bankruptcy for individuals and liquidation (or winding-up) for companies. The legislation governing personal bankruptcy is separate from corporate insolvency.

4.3 Institutional framework

4.3.1 Court system

The Courts in New Zealand operate in a hierarchical system. The Supreme Court is New Zealand's highest Court, formally coming into being on 1 January 2004, replacing the Judicial Committee of the Privy Council. Decisions of the Supreme Court are not appealable. The decisions of the Supreme Court are binding on all courts below, which include the Court of Appeal, High Court and District Court. Insolvency matters are generally within the jurisdiction of the High Court in the first instance. Subject to any statutory limitations, the High Court retains inherent jurisdiction with respect to insolvency.



Although the judgments do not have precedent value, the Courts in New Zealand will consider decisions of courts from other common law jurisdictions, particularly arising out of the United Kingdom, Canada and Australia.

The legal system in New Zealand is designed to balance the rights of parties to be properly heard against the need to have efficient processes in place, particularly in area of insolvency.

4.3.2 Enforcement of creditor rights

New Zealand is generally considered a creditor-friendly system. The Court rules provide simplified processes for recovery of undisputed debts. Security enforcement is relatively easy, though procedural limitations are imposed under various statutes.

[8] United Nations Commission on International Trade Law, hereinafter referred to as UNCITRAL.

The summary judgment procedure is the most commonly used procedure to recover debt claims arising under loans or supply arrangements, where there is no dispute. It is available only where there is no defence to a cause of action.[9] The jurisdiction of a Court to hear and determine a debt claim is dependent on the quantum of claim or debt.[10]

Once judgment is awarded, a number of enforcement mechanisms are available outside the insolvency process. Enforcement processes are governed by the District Court Act 2016, Senior Courts Act 2016 and rules of the relevant Court.[11] Enforcement processes include attachment orders, garnishee orders, charging orders and sale orders. The Court process also provides a creditor with a raft of tools to obtain information, including the ability to seek completion of a financial statement[12] and to require a debtor to attend the Court to be examined where the information is not provided.[13] Similar powers exist in the High Court, which permit the Court to make an order for examination[14] and for the production of records.[15] Both the District Court and High Court may (amongst other directors or orders) make orders following examination for payment of the judgment debt in instalments.

4.3.3 Liquidation and bankruptcy

The High Court has jurisdiction over all bankruptcy and liquidation proceedings. Judgment debts from tribunals and lower courts against individuals must be certified and moved to the High Court before bankruptcy proceedings can be commenced. Insolvency matters (personal and corporate) have their own dedicated Court lists and are within the jurisdiction of Associate Judges. Associate Judges have specialist civil jurisdiction which is largely focussed on company and insolvency matters, and other processes which are summary in nature. Because of the specialist jurisdiction, insolvency matters tend to progress in a streamlined and efficient manner.

Each process has its own set of specific procedural rules set out in the High Court Rules. Both bankruptcy and liquidation applications can be brought following non-compliance with specific “demand” notices issued under the Insolvency Act 2006 (Insolvency Act) or Companies Act.

The failure by a debtor to comply with the notices entitles the creditor to proceed with a petition or application to the Court to bankrupt or liquidate the insolvent person or corporate entity. Historically, the Courts in New Zealand frowned on the use of the statutory demand process under the Companies Act as a debt collection tool, holding that they should be used only to establish the solvency of a corporate entity. Since 2008, the Courts have moved away from the traditional view.[16] It is generally now accepted that if the debt is undisputed, a creditor can legitimately proceed with issuing a statutory demand as a means of enforcing its right to payment.

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9 High Court Rules 2016, r 12.2(1); District Court Rules 2014, r 12.2(1).
10 Claims in the District Court must be NZD 350,000 or under. All claims over this threshold are in the High Court. The High Court has jurisdiction over claims of all amounts. Claims under NZD 30,000 are heard in the Disputes Tribunal.
11 District Court Rules and High Court Rules 2016.
12 District Court Act 2016, s 146; High Court Rules 2016.
13 District Court Act 2016, s 148, and District Court Act 2016, s 149,
14 High Court Rules 2016, r 17.12.
15 *Idem*, r 17.12(4).
16 *Pioneer Insurance Company Ltd v White Heron Motor Lodge Ltd* [2008] NZCA 450 and *AMC Construction Ltd v Frews Contracting Ltd* [2008] NZCA 389.

4.3.3.1 Secured creditors

Secured creditors are well protected under New Zealand law. Security interests are addressed below under paragraph 5.

4.3.3.2 Creditor rights in insolvency

New Zealand's insolvency regime is focussed on protecting the collective interests of creditors. To this end, the interests of shareholders, management and other related parties are treated as being subordinate to those of creditors.

Both the personal insolvency and corporate liquidation regimes are designed to facilitate the orderly winding up of the affairs of the insolvent. The objective is to enable an independent third party to realise any available assets remaining in the estate of the bankrupt, or liquidated company, for distribution to unsecured creditors. Unsecured creditors participate in the distribution process on a *pari passu* (equal sharing) basis, in accordance with their statutory entitlements.

Reflecting the stated objectives of Parliament,[17] following bankruptcy or liquidation, the participation of creditors is generally limited to proving their claim and participating in meetings as provided for under the relevant legislation (including to vote on the appropriateness of the liquidator). Creditors may also hold appointed third parties to account by asking the Court to exercise its supervisory jurisdiction in certain circumstances.

Otherwise, it is the Official Assignee (OA) and / or liquidator who is conferred specific statutory powers to impugn certain transactions occurring in the period prior to liquidation or bankruptcy, to "replenish" the pool of assets for creditors where the transactions have had the effect of preferring a creditor or class of creditors ahead of other creditors in the same class (broadly this group of transactions are known as "voidable" or "insolvent" transactions). Additionally, the liquidator may also bring claims which were vested in the company, including claims for breach of duty (including trading whilst insolvent).

The intent of the debtor is not relevant for the purposes recovery of "insolvent transaction" actions; rather, the focus of the Court is on whether the effect of the transaction had the effect of benefitting of some creditors at the expense of others (as assessed in the bankruptcy). If so, the principle of *pari passu* will be offended and insolvency law requires that the asset be brought back in, so all creditors are treated equally. Insolvent gifts and the right to recover contributions made by the bankrupt to the property of another, are specific to personal insolvency.

Where there have been acts taken to prejudice creditors, the objective of the legislative provisions is to allow for the recovery of assets which have been disposed of to the detriment of creditors, so they can be redistributed to creditors in accordance with their insolvency entitlements.

Most claims which are created by the Insolvency Act or Companies Act, will have a limitation period of six years from the time of appointment.

As a general rule, secured creditors sit outside the collective process, though they may "opt in" under the various insolvency processes. Subject to limited exceptions,

[17] See long title Companies Act 1993, http://www.legislation.govt.nz/act/public/1993/0105/latest/DLM319570.html.

secured creditors are generally entitled to enforce their rights in bankruptcy, liquidation and other corporate rescue processes.

Over recent years, New Zealand's corporate insolvency regime has been amended to include rescue options which recognise the legitimate interests of companies continuing to trade, even if creditors' rights may be compromised. The Companies Act provides for two main corporate rescue regimes, namely compromises and voluntary administration.

4.3.4 Administration of insolvency processes and regulation

4.3.4.1 Bankruptcy

Bankruptcies in New Zealand are administered through the Insolvency and Trustee Service (ITS), a business unit of the Ministry of Business, Innovation and Employment (MBIE), a governmental agency. The ITS maintains an online searchable public register of bankrupts and parties subject to other insolvent processes.[18] A separate register is also maintained by the ITS for company liquidations.

The OA, appointed under the State Sector Act 1988, administers the Insolvency Act, insolvency provisions of the Companies Act and Criminal Proceeds (Recovery) Act 2009.[19] There are normally four positions, with a number of deputies and insolvency officers who report to and discharge the OA's duties under their direction and control. The OA (and any other party appointed under section 399 of the Insolvency Act) is an officer of the Court.[20]

Subject to limited exceptions,[21] the OA administers all bankruptcies and other personal insolvency processes, including the "No Asset Procedures" and Debt Repayment Orders. The OA may also be appointed from time to time to address company liquidations, though this is less common. The OA's rights, powers and obligations are set out in the Insolvency Act.

4.3.4.2 Corporate insolvency

Corporate insolvency processes in New Zealand are generally administered by third parties by private appointment (that is, at the request of a creditor).

Prior to 2019, insolvency practitioners were not subject to a formal licensing or regulatory regime. Instead, regulation was largely through the legislative framework which imposed obligations and duties on practitioners taking appointments. These included:

- statutory duties and powers / rights set out in the Companies Act, Receiverships Act 1993 (Receiverships Act) and Insolvency Act;
- statutory criteria for those taking appointments;[22]

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18 Insolvency Act, s 340.
19 *Idem*, s 399(2).
20 *Idem*, s 399(2).
21 The Official Assignee does not administer proposals put forward by an insolvent to compromise debts, summary instalment orders and or administrator of insolvent deceased estate who is appointed by Court.
22 Companies Act, s 280.

- supervisory powers of the Court in relation to liquidations, voluntary administration and receivership appointments;

- self-regulation through an accreditation system operated by industry bodies, Restructuring and Insolvency Turnaround Association New Zealand (RITANZ) and Chartered Accountants Australia and New Zealand (CAANZ);

- general ethical and professional standards governing those practitioners who were members of professional accounting bodies.

In 2015, the Minister of Commerce and Consumer Affairs established the Insolvency Working Group (IWG) to examine various aspects of insolvency law, including whether a regulatory framework was required for the insolvency profession. The IWG's first report released in July 2016 concluded that the existing regime was unsatisfactory.[23] The IWG noted that the allowing everyone to take appointments unless one of the disqualifying criteria applied, allowed individuals with a lack of integrity, experience, knowledge and skill, to take appointments.[24] The second problem was attributable to the lack of accountability by insolvency practitioners. The regime created a barrier to creditors wishing to challenge unsatisfactory conduct as a Court process was required, which was costly. This was a particular issue in New Zealand which is comprised of predominantly SMEs.[25]

Parliament has since passed legislation in response to the IWG recommendations. Regulation of insolvency practitioners is now governed by the Insolvency Practitioners Regulation Act 2019 (IPRA) and the Insolvency Practitioners Regulations (Amendment) Act 2019 (IPRAA).[26]

The IPRA regime provides for co-regulation. The Registrar of Companies is empowered to grant accreditation to individuals or industry bodies, who in turn will be responsible for the licensing of individual practitioners and monitoring / regulating conduct. The Registrar of Companies has disciplinary powers under the co-regulation regime. Practitioners are required to be fit and proper to take appointments and demonstrate that they meet minimum standards of competence and experience to obtain a licence. Penalties are imposed on those practicing without a licence.[27]

Self-Assessment Exercise 1

Question 1

For each of personal and corporate insolvency, what is the main governing legislation for personal insolvency?

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23 Review of Corporate Insolvency Law, *Report No 1 of the Insolvency Working Group, on insolvency practitioner regulation and voluntary liquidations*, Ministry of Business, Innovation and Employment, 27 July 2016 – available at https://www.mbie.govt.nz/assets/5a5ee108bb/review-of-corporate-insolvency-law-1.pdf.

24 Section 280 of the Companies Act provided that anyone was qualified to take appointments, provided they were at least 18 years old, not an undischarged bankrupt, had not been certified under mental health legislation and did not fall within other, narrowly defined, disqualifications.

25 See above under paragraph 3. 97% of businesses are small, and approximately 2% are mid-size.

26 Initially, it was expected that all legislative amendments under the IPRA and IPRAA would come into force on 17 June 2020. That has now been delayed to June 2021. See Covid-19 Response (Further Management Measures) Legislation Act 2020. Provisions in the IPRA and IPRAA which provide for the Registrar to prescribe requirements for a license, grant accreditation and for regulations to be made, are in force.

27 Fines of up to NZD 75,000.

Question 2

In which court may insolvency proceedings be brought?

Question 3

For each of personal and corporate insolvency - How is it administered and is there a regulatory body?

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. SECURITY

Under New Zealand law, security may be granted over both real property (land) and personal property (property other than land), tangible and intangible.

Security interests in New Zealand can, and should, be registered. Registration is completed online. Failure to register may result in the loss of priority to a prior ranking registered security interest. The failure to register a security interest in respect of personal property does not affect the enforceability of the interest against a liquidator or the OA.

5.1 Security interests in land – immoveable property

Land ownership and interests are registered through an electronic platform in New Zealand under the Torrens system.[28] Indefeasibility is core to the Torrens system.

The electronic register is administered and maintained by Land Information New Zealand (LINZ), the government body tasked with managing land titles and other dealings with land.[29] The register is searchable by the public. Access to functions such as registration or discharges of mortgages, is conducted through a licenced provider (conveyancing professionals / lawyers).

The most common form of security in land in New Zealand is a mortgage security. Although mortgage interests are registerable under the Land Transfer Act, registration is not mandatory. As a general rule, registered interests will have priority over unregistered interests. Failure to register can result in priority being lost, or extinguishment of any interest. The priority of competing unregistered interests is generally determined by the date of their creation.[30] The general rule may give way in circumstances where the Court finds the merits are unequal, or where some conduct may have caused a party to conduct itself in a different manner.[31]

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28 This is provided for under the Land Transfer Act 2017.
29 For a complete list of legislation administered by LINZ, see https://www.linz.govt.nz/about-linz/our-organisation/legislation-linz-administers.
30 *O'Leary v Sentiero Properties Ltd* [2006] NZCA 363.
31 *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, at 276.

A mortgage (registered or unregistered) operates as a statutory charge, it does not transfer any interest in the land to the mortgagee.[32] The mortgage interest is usually attached to an ancillary right to sell.

The enforcement of a mortgage interest in New Zealand on default is governed by the Property Law Act 2007 (PLA).
Land which is designated Māori Land under the Te Ture Whenua Māori Act 1993 (Māori Land Act) is subject to special protections and restrictions which do not apply to other land in New Zealand. Māori Land cannot be realised outside of bankruptcy in satisfaction of an owner's debts or liabilities.[33] Land designated as Māori Land does not automatically vest in the OA on bankruptcy – a court application is required. The OA's powers of sale of the interest in land is governed by the provisions of the Māori Land Act. The OA can only divest an interest in Māori Land in accordance with the Māori Land Act.[34]

5.2 Security over personal property – (moveable property)

5.2.1 The Personal Property Securities Act 1999

Prior to the introduction of the Personal Property Securities Act 1999 (PPSA), security interests in New Zealand were governed under various different statutes which treated security interests in different ways, depending on the nature of the property, parties and, in some cases, the nature of the transaction.[35]

The PPSA represented a significant change to the old regime. The PPSA now governs all security interests in personal property, save for some exceptions set out in the legislation.[36] The New Zealand PPSA is modelled on the Saskatchewan Personal Property Security Act, which is similar to other Western Canadian personal property security regimes.

In short, the PPSA regime is premised on a public registration system, where secured creditors are required to give notice to the public of any interests claimed in a debtor's assets. Care must be taken as incorrect registration can invalidate the registration, with the result that priority is lost.[37]

Security interests may be over fixed assets (that is, specific security or fixed charge) or over general assets that are "circulating" so that the security attaches to any asset which the debtor acquires an interest in after the security is taken (previously known as the floating charge).

Security over personal property (including goods and chattels, inventory, shares and other investment instruments, bank accounts and intellectual property) typically constitute "security interests" for the purposes of the PPSA. The PPSA also deems

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32 Property Law Act 2007, s 79, and Land Transfer Act 2017, s 99. This is different to the position at common law and under the Deeds system, under which a mortgage security was effected by a conveyance to the mortgagee of the mortgagor's legal estate in the land as security for repayment of the money lent.
33 Te Ture Whenua Māori Act 1993, s 342.
34 *Idem*, s 343.
35 Personal Property Securities Bill, No 251-2, Commentary as reported from the Commerce Committee.
36 Personal Property Securities Act, s 23.
37 Note that s 35 of the Personal Property Securities Act provides that other than as provided under the legislation, the security agreement is effective according to its terms. Specific rules apply to goods such as vehicles or other prescribed serial-numbered goods, and incorrect registration against a debtor's name, will render the financing statement seriously misleading (and therefore defective).

certain transactions to be security interests, including leases of one year, and commercial consignments.[38]

The focus of the PPSA is on the substance of the transaction, rather than form. The statute also provides that title (that is, ownership) is irrelevant. This is significant as holding title in collateral to secure payment or performance,[39] will no longer be effective. Notably, the PPSA only governs those interests that are consensual in nature.[40]
The PPSA is premised on two key concepts, being **attachment** and **perfection**.

Attachment occurs when the security is enforceable in terms of the PPSA against the debtor and third parties. In order for attachment to occur, value must be provided by the secured party, the debtor must have rights in the collateral it is granting security in and the security must be enforceable against third parties in terms of the PPSA.[41]

Perfection under the PPSA determines the priority of the secured party's interest. A secured party who fails to perfect will cede priority to a party who has perfected its security interest. Perfection cannot occur, unless the security interest has attached.[42]

Perfection occurs in two ways – registration of a financing statement on the PPSR within any relevant statutory timeframe, which records the security interest claimed, or where the secured party (or its agent) takes possession/control of the collateral (other than by way of repossession or seizure). The most common method of perfection in New Zealand is through registration. Once an interest is perfected, the PPSA provides for the interest to continue in the proceeds of the collateral.

Failure to perfect the security interest does not render the security interest invalid; it results in the loss of priority of a security claim to a prior ranking secured creditor asserting a security interest over the same asset (generally a bank). The security agreement otherwise remains effective according to its terms.[43]

The PPSA has a default set of priority rules. Perfected interests take priority over unperfected. Competing perfected interests are governed by time of registration (as opposed to attachment).[44] Priority between unperfected interests in the same collateral is determined by order of attachment.[45] The general rule at section 66 of the PPSA is subject to other specific rules stipulated under the statute. Some of these rules include rules relating to purchase money security interests (PMSI).[46]

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38 See Personal Property Securities Act, s 17.
39 A common example of this is a retention of title agreement in trade supply.
40 See Personal Property Securities Act, s 23(b), which excludes interests which arise by operation of law.
41 Personal Property Securities Act, s 40. Section 36 of the PPSA provides that a security agreement is enforceable against a third party only if the collateral is in the possession of the secured party, or the debtor has signed or assented to by letter, facsimile, electronic mail, cable, telegram, telex message or some other similar means of communication to a security agreement that contains an adequate description of the collateral by item or kind which enables it to be identified, or a statement that security is granted in all the debtor's present and after-acquired property or all of the debtor's present and after-acquired property, except of specified items or collateral.
42 *Idem*, s 41(a).
43 *Idem*, s 35.
44 For that reason, many financiers and credit providers will register on the PPSR as soon as they are approached, even if credit or funds have not yet been provided or advanced.
45 Personal Property Securities Act, s 66.
46 Most common where there is a supply of goods, or funds are advanced to purchase specific assets. The PPSA sets out specific timeframes for perfection of a PMSI interest. As a matter of policy, PMSIs are given "super priority" to ensure that trade creditors are protected for value they provide in the course of trade, ahead of other prior-perfected security holders, such as a bank.

There are specific timing requirements for registrations relating to PMSI interests. Additionally, secured creditors are required to comply with specific rules relating to assets that have changed hands, or, where collateral is moved into New Zealand from overseas, or out of New Zealand. Provided the collateral is in New Zealand, the interest should be registered. Security interests which are granted by entities located in New Zealand should all be registered, regardless of the location of the collateral.

Rules around enforcement of security interests relating to personal property are governed by the PPSA and the PLA.

5.2.2 Enforceability against execution creditors, liquidator or OA and other third parties

An execution creditor who seizes collateral has priority over a secured creditor with an unperfected security interest in the same collateral, at the time of execution.[47] This gives an unsecured creditor priority over a secured creditor who fails to register on the PPSR.

The above recognises that the PPSR is intended to be notice to the world of claimed security interests in a debtor's collateral. A creditor who searches the PPSR should be able to rely on it to make decisions not only about lending, but also to decide on what enforcement steps it should take, if any.

The above position is however inconsistent with the position of unperfected interests that a secured creditor wishes to enforce against the OA in bankruptcy or a liquidator. In this circumstance, the security interest remains enforceable. An unperfected secured creditor may assert its right and interest against the liquidator or OA, even after bankruptcy or liquidation has occurred.

5.3 Secured creditors in insolvency

Secured assets (whether in personal or corporate bankruptcy) generally fall outside the pool of assets available for realisation and distribution by the OA and liquidator. Secured creditors generally retain their rights of enforcement outside the insolvency process, though mechanisms exist under the legislation for secured creditors to surrender their securities at their election and to participate in the insolvency process. The most common enforcement right exercised by security holders is the appointment of a receiver, though this can only be done if this has been contractually agreed. The Court retains a discretion to appoint a receiver; however, this power is rarely exercised.

Secured creditors are generally paid ahead of other creditors in priority, outside of formal insolvency. In liquidation, secured creditors holding security in accounts receivable or inventory are paid after specified creditors in Schedule 7 of the Companies Act (employee claims, money owed on account of purchase price of goods, costs of a compromise and certain tax), out of the same assets (that is, those creditor claims have a priority claim to that of a secured party).[48]

Although secured creditors are not normally bound by the collective process and can act in their own interests, certain processes in insolvency will limit these rights.

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47 Personal Property Securities Act, s 103.
48 Companies Act, Sch 7, para 2(1)(b)(ii).

Examples of this appear in voluntary administration[49] (see paragraph 6.5.5 below) or where a business debt hibernation scheme (BDH) has been proposed (see below at paragraph 6.5.4). Secured creditors with security over over all, or substantially all, of a debtor's assets, will usually not be bound by any moratorium or will have a certain period during which they can act.

Self-Assessment Exercise 2

Question 1

Explain the two key concepts underpinning personal property securities legislation in New Zealand.

Question 2

In the event there is a failure to perfect a security interest, what is the effect of such a failure against a) third parties and b) a liquidator?

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. INSOLVENCY SYSTEM

6.1 Relevant legislation

New Zealand's insolvency laws are set out in multiple pieces of legislation. The core legislation includes:

- Insolvency Act
- Companies Act
- Receiverships Act 1993
- Insolvency (Cross-border) Act 2006 (Cross-border Act)
- Corporations (Investigation and Management) Act 1989 (Corporations IM Act)

Personal insolvency in New Zealand is referred to as bankruptcy. There are also a number of alternatives to bankruptcy provided for under the legislative framework. Corporate insolvency, or rescue processes, include liquidation, compromises, business debt hibernation, voluntary administration, and statutory management. Receivership is addressed separately as it is not a process which is intended for the collective process (as a rule of thumb).

[49] Secured creditors that do not hold security over all or substantially all of the debtor's assets are subject to an automatic stay on enforcement when a corporate debtor enters voluntary administration. Exceptions apply if action was commenced before the VA process commenced.

Various entities in New Zealand have specific rules that apply to their supervision and management in insolvency. An example of this includes registered banks[50] and licensed insurers.[51]

Consistent with the objectives set out in the Insolvency Act and Companies Act, Court involvement is usually minimal. The role of the Court is generally supervisory in nature.

6.2 Personal bankruptcy and alternatives

6.2.1 Application of regime

New Zealand's bankruptcy laws apply to those debtors who have a presence or connection in or to New Zealand. The adjudication of a debtor as a bankrupt affects all assets of the bankrupt, whether in New Zealand or overseas.[52] The debtor's property and assets vests in the OA as an independent stakeholder. This will be the case for both existing assets and assets received in the course of the bankruptcy. Property located overseas vests in the OA, however the OA is subject to the laws of the jurisdiction in which the assets are located.

On adjudication, The OA's principal role is to realise available assets of the debtor and to distribute them in accordance with the provisions set out in the Insolvency Act. All unsecured creditors are affected by the bankruptcy and are subject to the collective regime. The Insolvency Act entitles the OA to recover certain assets that are transferred before the bankruptcy for the benefit of creditors.

Once bankruptcy has commenced, the bankrupt is limited in the business activities he or she can undertake. Bankrupts cannot travel without the OA's permission, manage, control or be a director of a business/company, be self-employed or employed by a relative or relative's business,[53] be a director of a company, without permission of the OA.

Alternative to bankruptcy include:[54]

- Debt Repayment Order approved (DRO) / Summary Instalment Order (SIO). In summary, this allows an insolvent to propose a debt repayment plan under sections 340-360 of the Insolvency Act.
- No Asset Procedure (NAP) under sections 361-377 of the Insolvency Act.
- Court Proposals for the repayment of creditors (pre-bankruptcy).
- Compositions to repay creditors (post-bankruptcy).

Personal bankruptcies in New Zealand are more likely to be debtor instigated, rather than creditor instigated.[55] The statistics in New Zealand for the 2018/2019 year show that of the 2,890 insolvency procedures:[56]

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50 Reserve Bank of New Zealand Act 1989.
51 Insurance (Prudential Supervision) Act 2010.
52 See Insolvency Act, ss 7(1)(a), 101, 102.
53 This extends to businesses run by relatives.
54 Insolvency Act, s 8.
55 https://www.insolvency.govt.nz/support/about/statistics/insolvency-procedure-statistics/debtors-vs-creditors-applications/.
56 https://www.insolvency.govt.nz/assets/pdf/Statistical-Data-Reports/insolvent-debtors-infographic.pdf.

- SIO: 348
- NAP: 1,218
- Bankruptcy: 1,334 (899 voluntary, 435 creditor petitions)

Under all processes, a debtor is entitled to retain some income to live off, tools of trade (which may be limited in value) and a motor vehicle (limited in value). Kiwisaver funds (a form of retirement savings) are protected while they remain invested.

6.2.2 Alternatives to bankruptcy

6.2.2.1 Debt repayment order

A DRO is available to debtors with total debts of under NZD 50,000, who have the means to pay down some debt. A DRO allows an insolvent to enter into a debt repayment plan to repay debt over time (three to five years). Certain debts cannot be paid off under a DRO (student loans, fines, penalties, reparation orders and debts incurred after a DRO is approved). Repayments otherwise include payment of fixed costs and debts.[57] Surplus funds are returned to the debtor.

An application is made via the ITS site electronically. The OA is tasked with approving such applications. The approval of a DRO gives rise to a moratorium. Creditors are unable to pursue a debtor for payment of unsecured debt included in the DRO and interest and penalties stop accruing. The administration of the DRO process is managed by a DRO Supervisor. The DRO Supervisor is independent of the OA, who retains a supervisory role.[58]

Benefits of a DRO include that it avoids the consequences of formal bankruptcy and its perceived stigma. Adverse consequences include that reporting requirements in relation to income and obligations to notify new lenders (which affects credit ratings).

6.2.3 No asset procedure

The NAP is available to debtors with total debts of NZD 1,000 – NZD 50,000, who have no means to pay down the debt. In addition, the process is not available if it has previously been utilised by a debtor or where the debtor is a previous bankrupt. A NAP clears all debts owed by a debtor at the end of 1 year (being the NAP period).

Application for the NAP occurs through the OA on the ITS site. If approved by the OA, the NAP will be advertised in the NZ Gazette and listed on the ITS website.

Debts included in the NAP include, in the main, all debts owed by the debtor at the time of application for the NAP (unless specifically excluded). Limited exclusions include:

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[57] 7.5% Administration costs, Official Assignee's costs of *circa* 2.5% and debts owed to creditors.

[58] Insolvency Act, s 226 – a party wishing to become a DRO Supervisor must apply to the Official Assignee for approval. The applicant is required to demonstrate relevant experience and qualifications, undertake credit and security checks and provide references to support the application. An unsuccessful applicant may challenge the decision under the Insolvency Act. The DRO Supervisor is responsible for giving notice to creditors, providing information about the debtor to the Official Assignee and monitoring payments to creditors.

- contingent debts will only be included if there is liability to pay as at the time the NAP is entered into. Future debts arising from contingent liabilities are not covered under the NAP;

- joint debts – only the liability of the debtor subject to the NAP is included;

- Overseas debts are included while the debtor is residing outside the jurisdiction in which the debt was incurred.

Debts excluded from the NAP include court fines and reparation debt, debt incurred after applying for the NAP and student loan debts. Other debts that will continue to attach to the debtor include debts that have been incurred by way of fraud, child support or maintenance payments and secured debt, where a debtor wishes to retain the item.

6.2.4 Proposals

A debtor who is unable to pay his or her debts when the fall due[59] may, as an alternative to the above or bankruptcy, put forward a proposal to creditors to repay debt.[60] The proposal procedure allows an individual to avoid the restrictions of bankruptcy, if approved. There are three stages to the making and acceptance of the proposal:

- the insolvent puts forward and files a proposal with the High Court, and calls for a meeting of creditors to vote on the proposal;

- the creditors must accept the proposal by a majority in number representing 75% in value of debt;

- An application must be filed with the Court to approve the proposal, if accepted by creditors.

A proposal may include a number of proposals or compromise.[61] Proposals are managed and administered by the provisional trustee.[62] The form of the proposal, what information is required and the rules around voting, are prescribed. The provisional trustee is tasked with calling the meeting of creditors once the proposal has been filed and circulating the proposal and supporting information to creditors.

Creditors are required to file a claim form to establish their entitlements to vote at the creditors' meeting. Only those creditors with admitted claims may vote.[63] The provisional trustee is required to accept or reject a claim for voting purposes,[64] but the decision is subject to appeal to the Court. Decisions on the rejection of a claim are required to be made in writing. If a claim is uncertain, the trustee is required to allow voting on a provisional basis, subject to the vote being declared invalid.[65]

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59 Insolvency Act, s 325.
60 Insolvency Act, s 326(1).
61 *Ibid*.
62 *Idem*, s 327.
63 A creditor is defined as a party with a provable debt under s 232(1) of the Insolvency Act. Section 232(1) provides that a debt or liability is provable is one owed by the debtor provable at the time of adjudication.
64 Insolvency (Personal Insolvency) Regulations 2007, reg 32(1).
65 *Idem*, reg 32(2).

Provided a quorum is properly constituted at a meeting[66] and subject to an exception for preferential creditors, all creditors are entitled to vote at the meeting for the full value of their claims.[67] If the proposal is not accepted, the provisional trustee is required to notify the Court. The proposal is then cancelled by the Registrar. If approved, an application is made by the provisional trustee for the approval of the proposal by the Court. Creditors may object at this stage on specific grounds set out in the Insolvency Act. The Court must not approval a proposal where certain matters have not been provided for.[68] The Court otherwise has a discretion to refuse approval on specified grounds set out in the Insolvency Act.[69]
Once approved by the Court, the proposal is binding on all creditors whose debts are provable, whether or not a claim has been made. Claims that are not provable or which are not affected by the proposal, are not subject to the approved proposal.

The trustee is required to give effect to the proposal once approved, which will continue in accordance with its terms. The Court may approve cancellation or variation to the proposal after approved in specified circumstances on the application of the trustee or a creditor and may adjudicate the debtor bankrupt on the request of a creditor or applicant.

6.2.5 Compositions

Unlike other alternatives to bankruptcy, compositions are made after a debtor has been adjudicated bankrupt. Like a proposal, the objective is to outline a scheme under which creditors are paid in whole or in part. A composition requires approval at three stages:

- approval by creditors at the first creditors' meeting. This requires a special resolution (majority in number voting representing 75% value of the debt);[70]

- approval by creditors by a confirming resolution. This requires a special resolution (majority in number voting representing 75% value of the debt).[71] The confirming resolution must be passed within one month after the preliminary resolution has passed.[72] The composition is ineffective unless the confirming resolution is passed. The creditors may confirm the composition on terms that vary from the terms contained in the preliminary resolution, if the final terms are at least as favourable to the creditors as the terms set out in the preliminary resolution.[73] If the confirming resolution has been passed, either the bankrupt or OA can apply to the Court to have the composition approved;

- approval by the Court. Similar to a proposal, the Insolvency Act sets out the grounds upon which the Court may refuse to approve the composition.[74]

The Insolvency Act provides for the bankrupt to remain liable for certain debts notwithstanding the composition, including the unpaid balance of debts in specified

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66 Regulation 26(1) of the Insolvency (Personal Insolvency) Regulations provides that two or more creditors (or their representatives) will constitute a quorum.
67 Note that the full value is calculated as an aggregate sum, including any set-off that might apply under s 254 of the Insolvency Act.
68 Insolvency Act, s 333(4).
69 *Idem*, s 333(3)(a) to (c).
70 *Idem*, ss 92 and 312(1).
71 *Idem*, ss 92 and 313(1).
72 *Idem*, s 320(1)(a).
73 *Idem*, s 313(2).
74 *Idem*, ss 315(3)(a)) to 315(3)(d).

circumstances.[75] If the proposal for composition provides for the payment in full of all creditors whose respective debts do not exceed a certain amount, that class of creditors must not be counted either in number or value for the purpose of counting the requisite majority of creditors for passing the confirming resolution.[76]

Once the composition has been approved by the Court, the bankrupt and OA execute a deed of composition to implement the proposal.[77] The deed must be executed within 5 working days after the Court has approved the composition, unless otherwise ordered by the Court.[78] Once executed, the OA must apply to the Court for confirmation of the deed.[79] The bankruptcy will be annulled by the Court once the deed is entered and filed in Court.

The annulment of the bankruptcy does not re-vest property in the bankrupt.[80] The deed will bind all creditors in respect of the deed. Subject to any provisions in the Land Transfer Act 2017, the property of the bankrupt must be dealt with as provided for in the deed.

6.2.6 Bankruptcy

6.2.6.1 General

Bankruptcy can be voluntary (debtor instigated) or forcible (bankruptcy occurs on the application to the High Court by a creditor).[81] All bankruptcies, whether voluntary or creditor instigated, are administered by the OA under the Insolvency Act.

A “debtor” pre-bankruptcy is not defined under the Insolvency Act. A debtor under the legislative regime is otherwise defined as the person who is adjudicated bankrupt under the Insolvency Act.[82] Adjudication occurs when a debtor is adjudicated bankrupt.

There is no statutory obligation on a debtor to enter into an insolvency process. However debtors can often be motivated to instigate voluntary bankruptcy as a means to obtain immediate relief from creditor claims. Creditors may be motivated to instigate bankruptcy as a means to bring about a collective realisation process. The threshold debt to initiate a personal insolvency process, is NZD 1,000. This amount must take into account all set-offs and counter-claims and any security held.

A bankruptcy will usually last for a period of three years from the date a statement of affairs is provided by the bankrupt to the OA.[83] After this period, the usual position is that the bankrupt is automatically discharged.[84] The Insolvency Act prescribes a number of circumstances where the automatic right to a discharge will not apply.[85] An objection to the discharge by a creditor or the OA is made by filing an objection in the High Court.[86]

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75 *Idem*, s 319(1).
76 *Idem*, s 313(4).
77 *Idem*, s 317(1)(a).
78 *Idem*, s 320(1)(c).
79 *Idem*, s 317(1)(b).
80 *Idem*, s 317(4).
81 *Idem*, s 10.
82 *Idem*, s 9.
83 Subject to objections regarding discharge from bankruptcy
84 Insolvency Act, s 290(1).
85 *Idem*, s 290(2)(a)-(c).
86 High Court Rules, r 24.36(1).

The bankruptcy is publicly listed on a searchable register administered by the ITS. The bankrupt will still be searchable on the register after the bankruptcy concludes for a further seven years. A bankruptcy will continue even after the bankrupt dies.[87]

A bankrupt may apply to the Court for an early discharge, unless the Court has previously declined an application for a discharge.[88] A creditor or the OA may oppose the application. The Court retains discretion to assess any factors it considers relevant, including the public interest. In appropriate cases, the Court may extend the bankruptcy beyond the three year period.

6.2.6.2 Voluntary bankruptcy

This process is instigated by the filing of an application by the debtor with the ITS, together with a statement of affairs which includes the prescribed information.[89] This is considered and approved by the OA. The time of adjudication of bankruptcy is taken as the time date when the application is filed by the debtor.[90]

6.2.6.3 Creditor instigated bankruptcy (involuntary)

The Insolvency Act prescribes the criteria that must be met before a creditor can petition the Court for a debtor's bankruptcy.[91] Rather than a singular definition of insolvency, the Insolvency Act sets out 12 acts which constitute acts of bankruptcy.[92]

Creditors who can demonstrate that an act of bankruptcy has occurred, may apply to the Court to bankrupt a debtor.[93] The act relied on must have occurred in the three month period prior to the date of application. A creditor must also comply with the formal requirements set out in the High Court Rules.

Failure to comply with a bankruptcy notice is the most common ground relied on by a creditor to bankrupt a debtor.[94] The bankruptcy notice is a form of demand which, if not complied with, results in an act of bankruptcy being committed. A bankruptcy notice in New Zealand is usually premised on a final judgment or final award against the debtor for no less than NZD 1,000.[95] The judgment creditor is required to apply to the High Court for the issuing of a bankruptcy notice.[96] If the judgment was obtained in the District Court, the judgment must be moved to the High Court for the purposes of issuing the notice.

A debtor receiving a bankruptcy notice may pay the demanded amount, give security to the satisfaction of the Court or creditor, or otherwise compromise the debt. The

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87 Insolvency Act, s 78.
88 *Idem*, s 296.
89 *Idem*, s 46(1). Note that transactions over the three year period prior to bankruptcy should be covered.
90 Insolvency Act, s 56 (see also s 49(2)).
91 The criteria is assessed as at the time of the application to the Court.
92 See Insolvency Act, ss 17 to 28.
93 There are exceptions relating to incapacitated persons and minors – these parties must be represented by a litigation guardian.
94 Insolvency Act, s 17.
95 The judgment may be a final judgment of the New Zealand Court, or a judgment registered under Pt 1 of the Reciprocal Enforcement of Judgment Act 1934, or on a judgment of an Australian Court registered under sub-part 5 of Pt 2 of the Trans-Tasman Proceedings Act 2010.
96 If the judgment has not been obtained in the High Court, the judgment must be certified and moved to the High Court before the bankruptcy notice will issue. The High Court Rules prescribe the form of the request. The Registrar may issue the notice provided that he or she is satisfied that payment for the judgment debt has not occurred.

recipient may seek to have the notice set aside.[97] If a creditor rejects an offer, security or the payment term, a debtor may still comply with the notice if he or she applies to the Court and satisfies the Court that the offer is sufficient to satisfy the creditor's debt.[98]

The High Court retains residual discretion as to all matters related to bankruptcy, including whether to adjudicate a debtor a bankrupt.[99] The Court's discretion is broad and it does not have to adjudicate a debtor a bankrupt, even if a creditor has established all requisite statutory criteria. The Court may decline to adjudicate a debtor bankrupt on the grounds set out at section 37 of the Insolvency Act and may make orders staying or halting the bankruptcy[100] to allow disputed claims to be heard, or where a proposal has been put forward.[101] Once an adjudication order is made, unless it is appealed, there is no ability to assert that the adjudication was invalid or that a prerequisite for adjudication was absent.

6.2.6.4 Consequences of bankruptcy

Steps that occur following bankruptcy, and the consequences of bankruptcy (which apply from the time of adjudication) are as follows:

- the bankruptcy is advertised by the OA;
- the bankrupt is required to file a statement of financial affairs with the OA;
- the OA may call a meeting of the creditors;
- creditors will be asked to file a proof of debt in the bankruptcy;
- the property of the bankrupt will vest in the OA;
- proceedings to recover debts provable in the bankruptcy are halted.;
- execution action must not be commenced or continued.[102]

Certain interests and assets of the bankrupt do not automatically vest in the OA. These include:

- income necessary to maintain the bankrupt and his or her dependants / family;
- land interests in Maori Land, as defined under the Maori Land Act, unless ordered by the Court;
- Kiwisaver funds while invested and provided the statutory age for the release of funds has not yet been reached;
- superannuation schemes;

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97 There are 10 working days to comply with the requirements of the notice or to apply to the Court to satisfy the Court that he or she has cost time against the creditors.
98 An application to the Court must be made within 10 working days of the date of service of the bankruptcy notice.
99 Insolvency Act, s 36.
100 *Idem*, ss 38 and 42-43.
101 *Idem*, s 41.
102 *Idem*, s 77(1).

- claims that are purely personal to the bankrupt (for example, a claim for personal injury or emotional distress);

- certain personal provisions and assets, up to a certain value (clothes, home and personal effects, tools of trade and vehicle).[103]

6.2.6.5 Bankrupt's duties and obligations

A bankrupt has a number of statutory duties, including:

- filing a statement of affairs with the OA. The bankrupt is incentivised to provide this as soon as possible as the time for calculating discharge from bankruptcy, is calculated from the date of filing of the statement of financial affairs;

- to assist the OA with the realisation of assets for the benefit of creditors;

- disclosing property acquired before discharge and to deliver property to the OA on demand;

- providing information to the OA (including that relating to income and expenditure, property and financial information, including duties to disclose bank accounts);

- contributing to repayment of debt from earnings, where earnings exceed the statutory threshold.

A bankrupt has the right to inspect documents, including rights to inspect proofs of debts filed, minutes of creditors meetings, examination records, and accounting records. He or she also has statutory rights to retain certain assets and to require the OA to accept or reject a creditor's claim.

6.3 The Official Assignee (OA) – powers, duties and recovery action

6.3.1 Rights and powers

The principal role of the OA is to realise and recover assets for distribution to creditors. The assets of the debtor (including rights in choses in action) vest in the OA from the time of bankruptcy. The OA is a trustee for the bankrupt's creditors and may exercise the powers which are conferred on trustees by the Trustee Act 1956.

The OA's powers are derived from the Insolvency Act (and otherwise as set out in the Trustee Act 1956). They are permissive and largely discretionary in nature. The powers must be exercised in good faith and for a proper purpose. The OA's powers include powers to conduct and administer the bankruptcy (including all those conferred by the Insolvency Act), to investigate the affairs of the bankrupt (including powers to examine), manage the property and assets of the bankrupt (including powers of sale, to disclaim and hold property), compromise debts or claims, discontinue proceedings and to seek Court assistance relating to the operation of the Insolvency Act in a bankruptcy.

[103] *Idem*, s 158.

6.3.2 Realisations in the bankruptcy and distributions

Secured creditors sit outside the distribution regime. Assets recovered by the OA must be distributed to unsecured creditors, in the following order of priority:[104]

- preferential claims;
- general unsecured creditor claims; and
- surplus funds are remitted to the bankrupt.

There are five categories of preferential claims.[105] They can be summarised as follows:

- **First priority**: Claims associated with administration of the bankruptcy and preservation of value of assets, for the benefit of unsecured creditors;[106]
- **Second priority**: These claims can be described as those which are elevated for public policies reasons. These include employee claims, liens, Kiwisaver and claims which are given priority under various pieces of legislation. The claims in this category (and in each category following) rank equally within this category and are reduced on a pro-rated basis, if there is shortfall for payment;
- **Third priority**: Sums which are owed on account of goods which have been paid for on layby;
- **Fourth priority**: Costs associated with putting together a proposal under sub-part 2, Part 5 of the Insolvency Act.; and
- **Fifth priority:** Certain tax claims by the Inland Revenue Department (New Zealand's tax office).

The claims listed in priority categories two to five above have priority over certain security interests under the PPSA, to the extent there are insufficient funds to meet all claims.[107] The specific securities subordinated to the above claims are an interest which:

- is over all or any part of the bankrupt's accounts receivable and inventory or all or any part of them;
- is not a perfected PMSI and have not been perfected at the date of adjudication and which arise from a transfer of an account receivable for which new value has been provided by the transferee.[108]

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104 *Idem*, s 274.
105 *Ibid*.
106 *Idem*, s 274(1)(a) to (c).
107 *Idem*, s 275.
108 The terms "accounts receivable", "new value" and "proceeds" have the same meaning as that ascribed under the Personal Property Securities Act 1999.

6.3.3 Creditor claims and participation in bankruptcy

6.3.3.1 Creditor claims

"Provable debts" under the Insolvency Act is defined widely. All debts or liabilities owed by a bankrupt at the time of adjudication are provable.[109] Contingent, prospective and future liabilities and claims are all provable in the bankruptcy.[110] Pre-adjudication interest[111] owed under contract is claimable up to the date of adjudication. Interest accrued after liquidation can only be claimed if there are surplus assets in the bankrupt estate.
Claims in a bankruptcy are subject to rules around insolvency set-off. All mutual debits and credits and mutual dealings between the bankrupt and a creditor claimant, must be brought into account,[112] so that only the net amount can be proved in the bankruptcy.[113] Although set-off is mandatory at the time of adjudication and self-executing,[114] in certain circumstances, the benefit of set-off may not be claimed, particularly where the party claiming the benefit of the set-off was on notice of an act of bankruptcy.

Claims that are not provable include fines, penalties, reparation orders, future child support payments or money orders made under the Sentencing Act 2002, debts or liabilities that are unenforceable against the bankrupt at law, debts that arise from liabilities that are incurred after the date of adjudication and claims which are for an uncertain amount (for example, a damages claim), unless the OA has estimated the value of the claim.

Secured creditors (as defined under section 3 of the Insolvency Act) sit outside the collective realisation regime. Security held over land (mortgage security) or personal property as provided for under the PPSA, are enforceable against the OA. Secured creditors have three options in relation to secured property. These include realising the security, valuing the security and proving for the balance, or surrendering the security for the benefit of the unsecured creditors.[115] The OA has the power to issue a notice requiring the secured creditor to decide which of its rights it wishes to exercise.[116] A secured creditor who fails to take action on such a notice will surrender its charge for the general benefit of the body of unsecured creditors.[117]

6.3.3.2 Process for submitting claim

The process for proving in the bankruptcy is fixed under the Insolvency Act and the Insolvency (Personal Insolvency) Regulations 2007. These rules apply to all creditors, including secured creditors and preferential creditors.

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[109] Insolvency Act, ss 231 and 232.
[110] The method of calculating debts payable six month or longer after adjudication is governed by s 253 of the Insolvency Act. See also Insolvency Act, s 251.
[111] This may not apply if the contractual rate of interest is oppressive as defined in the Credit Contracts and Consumer Finance Act 2003.
[112] The ordinary common law rules of set-off continue to apply. These rules include that the debits, credits and mutual dealings are capable of being expressed as a monetary claim and the dealings must arise between the same parties, in the same capacity.
[113] Insolvency Act, s 254.
[114] A debt does not need to have crystallised at the date of liquidation, however the obligation must be extant at the time of adjudication.
[115] Insolvency Act, s 243.
[116] *Idem*, s 244(1).
[117] *Idem*, s 244(2).

The OA gives notice to creditors that claims should be submitted. A timeframe will be provided in the notice to creditors and a claim form is provided. The requirement to file a claim is advertised. The requirements pertaining to the claim form are prescribed by Regulation 12 of the Insolvency Regulations.[118]

The OA is entitled to examine the claim form and make further enquiry and request further evidence to support the debt claim. If the OA forms the view that there is unlikely to be a distribution to creditors, he or she is not required to incur costs undertaking this exercise. The OA must admit or reject the claim in whole or in part as soon as practicable, or request further evidence to support the claim.[119] If the claim is rejected, the OA is required to notify the creditor of the grounds of rejection as soon as is practicable.[120] The bankrupt may also give notice to the OA, requiring him or her to reject a creditor's claim.[121]

The Court retains a supervisory role with respect to claims. It may modify the decision on the application of the OA, a creditor, or the bankrupt.[122] In matters of personal insolvency, the District Court may hear such applications, where the claims at issue are within its jurisdictional limit.

Creditors otherwise have limited rights of participation. They can attend and vote at meetings, if they are convened by the OA. These meetings may be called, for example, to allow creditors to vote on matters such as requiring public examination of the bankrupt, appointing a committee to assist with administration of the bankrupt estate and allowing the bankrupt to retain his or her tools of trade (over and above what the OA may fix under the Insolvency Act).

6.3.4 Actions by the OA

The OA has a number of statutory powers to investigate and pursue irregular transactions effected by the bankrupt in the period immediately prior to bankruptcy.[123] Recoveries from these actions are brought back into the pool of assets for distribution to unsecured creditors.

The main categories of action are irregular transactions (discussed below). In addition, the OA many also commence a claim to recover assets which were disposed of with the intention of defeating creditor claims under the PLA (see below).[124]

6.3.4.1 Process

The process for cancelling irregular transactions is outlined at section 206 of the Insolvency Act. The process requires the giving of notice by the OA, which allows the recipient to respond. The recipient has a statutory timeframe of 20 working days to respond. If an objection is made, the OA must go through a formal Court process. If the recipient does not object, the transaction is automatically set aside. The OA will then take steps to enforce the cancellation (usually by issuing proceedings seeking recovery of the asset or compensation or a monetary sum equivalent to the value of

[118] Insolvency (Personal Insolvency) Regulations 2007, Reg 12(2).
[119] Insolvency Act, s 234(2).
[120] *Idem*, s 235.
[121] *Idem*, s 237.
[122] *Idem*, s 238.
[123] Insolvency Act, Subpt 7, Pt 3.
[124] See Subpt 6, Pt 6 of the Property Law Act 2007 and s 47 of the Property (Relationships) Act 1976.

the transaction).[125] The Insolvency Act sets out a statutory defence. A recipient of a transaction may rely on this defence, even if the transaction has been automatically set aside. A creditor may avail itself of the defence by establishing (cumulatively) that he or she received the property or benefit / interest in good faith, a reasonable person in the creditor's position would not have suspected, the creditor did not have reasonable grounds for suspecting that the bankrupt would be unable to pay his or her due debts, and the creditor altered their position in the reasonably held belief that the transfer of the property or interest in the property to the recipient was valid and would not be cancelled.[126] There is a rebuttable statutory presumption of insolvency in the six month period immediately prior to the bankruptcy.

6.3.4.2 Insolvent transactions

The OA may pursue transactions that fall within the definition of "insolvent transaction" under the Insolvency Act.[127] The OA must establish that:

- There is a qualifying transaction that occurred in the six-month period immediately before the bankrupt's adjudication, or, in the case of a related party, in the two-year period prior to bankruptcy;[128] and

- The transaction is an "insolvent transaction" – that is, a transaction that occurred at a time the debtor was unable to pay his or her due debts and the transaction enabled the creditor to receive more than that creditor would have received in the bankruptcy.

Transactions that can be reviewed and clawed back by the OA are defined widely.[129] They include conveying or transferring of property, giving a charge over the bankrupt's property, incurring an obligation, undergoing an execution process, paying money or anything other step undertaken for the purposes of the transaction. In recovering an insolvent transaction, the statutory regime requires the OA to take into account those transactions which form part of the continuing business relationship which give rise to a fluctuating level of indebtedness during the course of trade. Only the net amount of the transactions can be recovered and only to the extent that the receipt of payment was in exchange for the predominant purpose of continued supply.

6.3.4.3 Insolvent charges

The OA may cancel a charge given in the two years immediately preceding the commencement of bankruptcy if following the granting of the charge, the debtor was unable to pay his or her due debts.[130] The terms "charge" and "property" are widely defined under the Insolvency Act.[131] The OA cannot cancel a charge where the secured creditor can demonstrate that one of the exceptions apply. These include where:[132]

- the charge secures money actually advanced or paid, or the actual price or value of property sold or supplied, or any other valuable consideration given in good

[125] Insolvency Act, s 207.
[126] *Idem*, s 208.
[127] *Idem*, s 195.
[128] *Idem*, s 194.
[129] *Idem*, s 195(2).
[130] *Idem*, s 198.
[131] *Idem*, s 3.
[132] *Idem*, s 199.

faith by the secured creditor at the time of, or at any time after, the giving of the charge;

- the charge is in substitution for a charge granted more than two years before the bankruptcy, except to the extent the amount secured by the substituted charge exceeds the amount secured under the existing charge, or the value of the property subject to the substituted charge is greater than the value of the property subject to the existing charge;

- the bankrupt, after purchasing property, has within the two years prior to adjudication given the seller a charge, to the extent the charge secures the unpaid purchase money, provided the charge was given not more than 15 working days after the date of the sale of the property.[133] The legislative provisions exclude the operation of the rule in *Clayton's case*[134] which otherwise would result in payments to the creditor being appropriated to the earliest debt (first in is applied to first out);

- the charge was granted more than six months before the date of adjudication or in the case of a related party, more than two years before adjudication.[135]

6.3.4.4 Insolvent gifts

Insolvent gifts can be cancelled by the OA.[136] The term "gift" is not defined under the Insolvency Act. Established case law in New Zealand has defined a gift as a transaction which "has the effect to bring about a diminution in the value of the donor's assets, or to otherwise reduce the value of the assets that would otherwise be available to the Assignee*".*[137] Gifts made in the two-year period prior to adjudication are vulnerable to being cancelled. There is no requirement that the OA be able to demonstrate that the bankrupt was unable to pay his or her due debts at the time the gift was made.[138]

The OA may also impugn gifts made in the period between two years before the date of bankruptcy up to five years prior to adjudication, if it can be shown that the bankrupt was unable to pay his or her due debts at the time the bankrupt made the gift.[139]

6.3.4.5 Property Law Act 2007 – dispositions of property with intent to defeat creditor claims

The OA has the ability under the Property Law Act (PLA) to apply to the Court to set aside dispositions of property which were made with the intent of prejudicing a creditor. The terms "disposition"[140] and "property"[141] are widely defined to capture a wide variety of transactions. The Court in New Zealand has also determined that there is no absolute requirement that a disposition by way of payment, be made out of the debtor's own money.[142]

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133 *Idem*, s 201.
134 *Devaynes v Noble* (1816) 35 ER 767.
135 Insolvency Act, s 203.
136 *Idem*, ss 204 and 205.
137 *Official Assignee v Mayers* [2012] NZHC 34 at 13.
138 Insolvency Act, s 204.
139 *Idem*, s 205.
140 Property Law Act, s 345(2).
141 *Idem*, s 4.
142 *Fisk v McIntosh* [2015] NZHC 1403.

A disposition prejudices creditors where it "hinders, delays or defeats the creditor in the exercise of any right of recourse of the creditor in respect of the property".[143] The provisions apply to dispositions by debtors who:

- were insolvent at the time of the disposition, or became insolvent as a result of the disposition.[144] A cash flow / liquidity test is applied;
- were engaged, or was about to engage, in a business or transaction for which the remaining assets were unreasonably small;[145]
- intended to incur, or believed, or reasonably should have believed, that the debtor would incur, debts beyond the debtor's ability to pay.

Both the OA and creditor have standing to bring a Court action for recovery, though the OA is required to comply with the process set out in the Insolvency Act. On application through the Court, and provided the requisite elements of section 347 are made out, the Court may make orders vesting the property subject to disposition to specified parties.[146] A recipient of property may object to an application if:[147]

- The person acquired the property for valuable consideration and in good faith without knowledge of the fact that it had been subject of a disposition to which the PLA applies; or
- The person acquired the property from a person in circumstances specified above.

There are a number of decisions relating to good faith and value. The focus of the Court is whether, on balance, it would be unjust to order recovery, in the circumstances of the case.

Self-Assessment Exercise 3

Question 1

What options are available to an individual in New Zealand to manage personal insolvency? Which ones are voluntary processes?

Question 2

What are the benefits of invoking a voluntary alternative process?

Question 3

What is the policy underpinning the rights of the OA to unwind insolvent transactions by the bankrupt?

[143] Property Law Act, s 345(1)(a).
[144] *Idem*, s 346(2)(a).
[145] *Idem*, s 346(2)(b).
[146] *Idem*, s 350(2)(b).
[147] *Idem*, s 349.

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

6.4 Corporate liquidation

6.4.1 Introduction

Liquidation is a statutory winding up process. Liquidations in New Zealand can be solvent liquidations, or insolvent. This section focusses on insolvent liquidations.

There is no mandatory requirement or obligation to file for liquidation.

The Companies Act liquidation regime applies to a company incorporated and domiciled in New Zealand, or overseas companies registered as doing business in New Zealand.[148]

As with bankruptcy, liquidation is a collective insolvency process where an independent third party[149] takes control of the company and its assets, realising them for the benefit of all unsecured creditors to share on a *pari passu* basis.[150] Once the liquidation process is complete, the company is usually removed from the register of companies.[151] Only those assets in which the debtor company has a beneficial interest and which are not secured, are available to unsecured creditors. Secured and trust assets are not available for distribution.

There is no specific process in New Zealand for small or assetless companies. However, where there are limited assets, a party may ask the Court to appoint the OA, though this is more usual where there are other circumstances justifying the appointment (for example, where there is a desire to ensure impartiality because of an extant shareholder dispute).

A liquidator's appointment may be vacated if a liquidator dies, he becomes disqualified from acting, or if the creditors vote to replace the liquidator at the initial meeting of creditors convened after his appointment.[152] A liquidation may be brought to an end by application to Court by the parties specified in section 250 of the Companies Act, including the liquidator, a shareholder or creditor.[153] The Court may terminate the liquidation if it is just and equitable to do so, or in terms of its inherent jurisdiction.[154] A liquidator also has standing to appoint an administrator, commencing the voluntary administration process.[155]

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148 Companies Act, s 332. Although this section focuses on companies registered under the Companies Act, the liquidation regime can also apply to other entities such as Building Societies, Charitable Trust Boards and Trusts, Credit Unions, Friendly Societies, Incorporated Societies, Industrial and Provident Societies. The legislations governing these entities and bodies have their own specific rules about liquidation, however the process generally will be governed by the Companies Act, subject only to any limitations arising out of the empowering legislation.

149 *Idem*, s 241(1). Consent in writing must be given by a third party before the appointment is made.

150 *Timberworld Ltd v Levin* [2015] NZCA 111, [2015] 3 NZLR 365 at [63].

151 Companies Act, s 15.

152 *Idem*, s 243.

153 *Idem*, s 250.

154 *Idem*, s 250(1).

155 *Idem*, s 239H.

6.4.2 Process

6.4.2.1 Gateways to liquidation

There are three main gateways to liquidation in New Zealand:

- Voluntary liquidation by members (for example, the board or shareholders). This requires a special resolution of shareholders or a qualifying event in the constitution.

- Involuntary liquidation – usually through a Court application by a creditor or disgruntled shareholder on the basis that the company is unable to pay its debts or it is just and equitable for a liquidator to be appointed. Involuntary liquidation can also occur following an unsuccessful voluntary administration where the majority of creditors have voted against a Deed of Company Arrangement (DOCA) and in favour of liquidation.

6.4.2.2 Appointment by board or shareholder (voluntary)

The board or a shareholder may only appoint a liquidator after an application is made to the Court for the appointment of a liquidator under section 241(2)(c) of the Companies Act, if they do so within 10 working days after service of the application.[156]

6.4.2.3 Court Application

The Companies Act makes provision for a number of specified parties to apply to the Court, including creditors and shareholders.[157] A creditor includes a prospective or contingent creditor.[158] The Court retains discretion as to whether it is appropriate to liquidate the company.

The Court may liquidate the company on the grounds set out in the Companies Act, including where the company is unable to pay its debts,[159] the board or its directors or shareholders have persistently or serious failed to comply with its obligations under the Companies Act or Financial Reporting Act 1993, or where the Court is satisfied it is just and equitable that the company be put into liquidation.[160] The application must be advertised to give other creditors the opportunity to participate in the application.

In the vast majority of cases in New Zealand, creditors who petition the Court do so in reliance on the presumption of insolvency arising as result of a company's failure to comply with a statutory demand issued under the Companies Act.[161] Once issued, a debtor has 15 working days to comply with the terms of the statutory demand.[162] Failure to comply gives rise to a rebuttable presumption of insolvency, although other

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156 *Idem*, s 241AA(2).
157 *Idem*, s 243(2)(c).
158 *Idem*, s 243(2)(c)(iv).
159 The Companies Act contains a definition of "solvency" – it employs a cash flow and balance sheet test.
160 Companies Act, s 243(4).
161 *Idem*, s 289. A statutory demand may only be issued on account of debts owed of NZD 1,000 or more.
162 Compliance may include payment of the debt or compromising of the debt in a manner that is satisfactory to the creditor claimant.

evidence as to a company's inability to pay its debts can be tendered.[163] A debtor may apply to the Court to set aside a statutory demand, but time frames for doing so are strictly enforced.[164]

Where an application has been made to the Court for the liquidation of a company, the Court may also appoint an interim liquidator. The powers of an interim liquidator include the powers of a normal liquidator to the extent required to maintain the value of the assets owned or managed by the company.[165] Before the Court appoints an interim liquidator, an applicant will need to demonstrate that liquidation of the company is inevitable and that there is an urgent need for a third party to take control of the assets of the company (usually premised on risk of dissipation or devaluation of the assets by some other means).

6.4.3 Who may be appointed

Currently, any person not disqualified from acting under section 280 of the Companies Act, may be appointed.[166] An appointee must consent in writing in order to be effective.[167] The OA may in limited circumstances act as the liquidator,[168] or where the Court makes the appointment.[169] It is usual in New Zealand to have dual liquidators appointed who usually act jointly, though they may also act severally. Once the IPRA regime comes into effect, persons taking appointments will need to hold a licence and meet other mandatory requirements.

6.4.4 Consequences of appointment

6.4.4.1 Vesting of rights and custody

The commencement of a liquidation results in the liquidator taking control and custody of a company's assets in the liquidator.[170]

The directors remain in office, however they cease to have any powers other than those reserved to them under part 16 of the Companies Act. They continue to have limited duties as provided under the Companies Act, such as assisting the liquidators, not to misapply or misuse company property[171] and disclosing information and records.[172] Shareholders cannot transfer shares, alter their rights or liabilities, or exercise powers under the Companies Act or constitution (other than as provided for at Part 16).[173]

The Companies Act also prohibits certain types of conduct, once an application has been made to the Court to put a company into liquidation or is in liquidation. The prohibited conduct is intended to prevent the obstruction of the liquidation. For example, persons are prevented from absconding to avoid payment of a debt,[174]

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163 Companies Act, ss 287 and 288. A creditor intending to rely on failed compliance with a statutory demand must issue its application to liquidate no later than 30 working days after the last date for compliance with the demand.
164 10 working day period under s 290 of the Companies Act.
165 Companies Act, s 246(2). The Court may limit this power as required – see s 246(3) of the Companies Act.
166 *Idem*, s 280 – This will be amended once the IPRA commences in full.
167 *Idem*, s 282.
168 *Idem*, s 241(3)(a).
169 *Idem*, s 241(3)(b).
170 *Idem*, s 248(1).
171 EBR Holdings Ltd (in liq) v van Duyn [2017] NZHC 1698 at [153].
172 Companies Act, s 261.
173 *Idem*, s 248.
174 *Idem*, s 273(1)(a).

examination or compliance with a Court order, concealing and / or destroying company property and records.[175]

6.4.4.2 Moratorium

On liquidation, all enforcement actions by unsecured creditors, including civil proceedings or execution steps against property, are stayed, unless consented to by the liquidator or permission is granted by the Court.[176]

This moratorium does not extend to secured creditors who are entitled to exercise their enforcement rights. A secured creditor is not generally entitled to participate in the liquidation of a company, as its rights are confined to the secured assets. It may participate by relinquishing its security for the benefit of the body of creditors, or otherwise take steps as set out under section 305 of the Companies Act.[177]

The result of a secured creditor not being bound by the moratorium is that in many cases there will be appointments of a receiver and liquidator, which run concurrently. The receiver will take control and realise the secured assets, leaving the liquidator with those rights that vest in him solely under the Companies Act as a liquidator. These rights include those actions discussed below.

6.4.4.3 Contracts in liquidation

New Zealand retains the distinction between executed and executory contracts.[178] Where the company has performed its obligations in an executed contract, the liquidator may continue to enforce the company's rights in the usual course. If the company has performed, it may prove as an unsecured creditor in the liquidation.

In an executory contract (one where there are still obligations to be performed on both sides) there are various ways the contract may be dealt with in the liquidation, including termination as a result of the liquidation,[179] the liquidator may call for performance of the terms, or the liquidator may disclaim the contract as onerous property, leaving the creditor to claim in the liquidation.

Contracts for essential services[180] (contracts for the retail supply of gas or electricity or the supply of water and telecommunications services) are prevented from demanding payment of debts owed to them in full for the supply of future services. Instead, the Companies Act provides that the charges incurred by the liquidator for essential services are preferential in the liquidation.[181]

A liquidator can often be left with contracts or property which are of little value or undesirable due to the liabilities which they attract. In these situations, the liquidator may exercise the power to disclaim.[182]

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175 *Idem*, s 273(1)(b) and (c).
176 In determining whether leave of the Court should be given, the Court will assess a range of factors, including whether "the claim should not be clearly unsustainable but the Court will not investigate the merits of the claim…". See *Fisher v Isbey* (1999) 13 PRNZ 182 (HC).
177 See the definition of "creditor" at s 240 of the Companies Act, and s 305.
178 *Re Park Air Services plc* [2000] 2 AC 172 (HL) at 187.
179 This can occur either because the contract at issue provides for it, or, because the liquidation results in breach or repudiation of the contract, entitling the other party to cancel under Subpt 3 of Pt 2 of the Contract and Commercial Law Act 2017.
180 Companies Act, s 275(1).
181 *Idem*, s 275(4).
182 *Idem*, s 269.

6.4.5 Creditor claims, set-off and netting-off arrangements

6.4.5.1 Introduction

As noted above, the laws of personal insolvency continue to apply to corporate insolvencies, unless the Companies Act provides to the contrary. The Companies Act makes express provision for creditor claims to be treated as if proved in accordance with the requirements of the Insolvency Act.[183]

Under the Companies Act, a liquidator is obliged to distribute available assets of the company in the order provided for under the statutory regime. Generally, assets which are subject to security interests must be accounted to the secured party. Otherwise, the Companies Act provides for distributions as follows:[184]

- preferential claims;[185]
- general unsecured creditor claims;[186] and
- surplus funds are paid out in accordance to the company's constitution.[187]

6.4.5.2 Creditor claims

On liquidation, a party asserting it is owed money by the debtor company may prove in the liquidation. The claim must be ascertainable as at the date of liquidation,[188] even if not yet quantified.

The term "creditor" is defined widely to include a party who would otherwise be entitled to claim in the liquidation of a company in accordance with section 303 of the Companies Act. An admissible claim under the Companies Act is widely defined to include a present debt or liability or a future, certain or contingent claim, whether or not it is able to be ascertained as at the date of liquidation.[189] The Companies Act sets out those claims which are not admissible in the liquidation.[190] The Companies Act sets out procedures for determining claims that are of an unascertained amount (for example damages), requiring the liquidator to either estimate the amount of the claim, or to refer the matter to the Court to determine.[191] The Companies Act also addresses, amongst other claims, futures debts,[192] claims for amounts owed in foreign currency,[193] interest claims,[194] claims by guarantors[195] and trade discounts.

The admissibility of a creditor claim in the liquidation is important not only because it determines a creditor's right to participate in a dividend, but also because voting

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183 *Idem*, s 302(2).
184 Secured creditors sit outside the distribution regime.
185 Companies Act, s 312 and Sch 7.
186 *Idem*, s 313.
187 *Idem*, s 313(4).
188 *Idem*, s 306(1).
189 *Idem*, ss 240 and 303.
190 *Idem*, ss 303(2) and 308.
191 *Idem*, s 307(1).
192 *Idem*, s 309.
193 *Idem*, s 306(2).
194 *Idem*, s 311(1).
195 Insolvency Act, s 272 and Companies Act, s 302(1).

rights in a liquidation are determined by whether the claim has been admitted and, if so, for how much.[196]

The process for the filing of claims is similar to that in bankruptcy.

Following liquidation, the liquidator will call for creditors to prove their claims by filing a creditor claim form. Notice is usually given with the liquidator's first report and advertised. The liquidator will fix the day by which creditor claim forms must be filed, including any claims asserting preferential status.[197] The contents of the claim form is prescribed,[198] but liquidators will ordinarily issue the proof of debt forms on their own letterhead. Once claims have been filed, a liquidator has an obligation to admit or reject the claim (in whole or in part) as soon as practicable.[199] A decision rejecting the claim must be given to the creditor in writing.[200] The decision can be revisited at a later stage by the liquidator; any amended decision must also be recorded in writing.[201] A creditor who disagrees with the liquidator's determination may appeal to the Court (noting that this step can only be taken if the Court gives permission for the challenge).[202] A creditor who fails to prove its claim by the cut-off date may lose the right to participate in a dividend, though late claims are permissible.[203]

A liquidation committee may be formed to assist the liquidator, though this is not common in New Zealand.

6.4.5.3 Set-off and netting arrangements

On liquidation, the Companies Act provides for the mandatory set-off of claims where there are debits, credits or mutual dealings between the debtor and creditor.[204] The set-off is self-executing and has the effect of netting off the claims, dollar for dollar, so that only the balance can be proved for in the liquidation. As with set-off in personal insolvency, the usual rules relating to set-off remain applicable. The right of a creditor or shareholder to claim the benefit of set-off may be circumscribed in the circumstances set out at section 310 of the Companies Act (premised on knowledge of a company's inability to pay its due debts).[205]

There are also special set-off rules that apply to netting contractual arrangements (an arrangement by which institutions offset the assets and liabilities they hold with each other so that they can show a net position rather than a gross position).[206]

6.4.5.4 Preferential claims

Under the Companies Act, a number of creditor claims are treated as preferential. The status of these claims is set out in Schedule 7 of the Companies Act. Pursuant to section 312(1) of the Companies Act, the liquidator is required to pay these claims from the assets of the company in the priority order set out in the Schedule. These

196 See, eg, Companies Act, Sch 5 and s 5, and Companies Act 1993 Liquidation Regulations 1994, Reg 19. See also s 258(2)(d) of the Companies Act.
197 Companies Act 1993 Liquidation Regulations, Reg 12(1).
198 *Idem*, Reg 6.
199 Companies Act, s 304(3).
200 *Idem*, s 304(4).
201 Companies Act 1993 Liquidation Regulations 1994, Reg 8.
202 Companies Act, s 284(1)(b).
203 Companies Act 1993 Liquidation Regulations 1994, Reg 13.
204 Companies Act, s 310.
205 *Idem*, s 310(2) and 310(3).
206 *Idem*, ss 310A-310O.

claims get paid ahead of unsecured creditor claims and, in certain circumstances, over secured creditors who hold security over accounts receivable and inventory.

There are five categories of preferential claims. These largely mirror those provided for under the Insolvency Act (see above).[207] The conditions that apply for priority payments are the same as those set out above at paragraph 6.3.2.

6.4.6 Liquidator's duties and powers

6.4.6.1 Liquidator's duties

Once the liquidator is appointed, his or her principal duty is to take possession of the realisable assets of the company and to protect and realise them for distribution to creditors in accordance with their statutory entitlements, in a reasonable and efficient manner.[208] The assets do not vest in the liquidator, unlike bankruptcy. Any surplus is distributed in accordance with the company's constitution, or the Companies Act, where there is no constitution.[209] In undertaking his or her duties, the liquidator acts in a hybrid role comprising fiduciary, agent of the company and trustee.[210] The liquidator is an officer of the Court and is answerable to the Court.

Although liquidators are not directors of the company, the liquidator's role is often compared to that of a director, with similar duties of good faith and skill care attaching to the role.[211] They are required to act in good faith, for proper purpose, impartially and independently. A liquidator cannot act in a position of conflict.[212]

The role of the liquidator and the various duties and rules that attach in the performance of certain tasks, are set out in the Companies Act and the Companies Act 1993 Liquidation Regulations 1994. The IPRA will also contain certain rules restricting the purchase of assets and goods.[213] A liquidator's statutory duties include duties to:

- give notice of the appointment;
- convene an initial meeting of creditors for the purposes of confirming the liquidator's appointment;
- call for and determine creditor claims;
- issue an initial report and six-monthly reports;
- keep records and accounts of the liquidation for not less than one year after the completion of the liquidation;
- convene a meeting of creditors at the request of creditors or shareholders;[214]

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[207] *Idem*, Sch 7.
[208] *Idem*, s 253.
[209] *Idem*, s 313(4).
[210] *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] NZCA 241, [2007] 3 NZLR 602 at [22].
[211] *Ibid*.
[212] See 1.2, RITANZ Code of Conduct, para 1.2, available at https://www.ritanz.org.nz/wp-content/uploads/2018/03/RITANZ-Code-of-Conduct-2018.pdf.
[213] Insolvency Practitioners Regulation Act 2019, at ss 65-67.
[214] A liquidator is only required to convene this meeting where he or she receives a request from a creditor or creditors which equate to more than 10% in value of debt.

- have regard to the views of creditors and shareholders;[215]
- notify suspected offences to the Registrar of companies;
- invest funds at a registered bank.

6.4.7 Statutory powers

6.4.7.1 General

A liquidator has a number of statutory powers conferred to enable him to administer the liquidation and discharge his functions and duties under the Companies Act. The Companies Act also has an express list of powers, though the powers conferred are not exhaustive.[216] In exercising these powers, the liquidator is required to have regard to the views of creditors, shareholders and the liquidation committee (if appointed) but he or she is not bound by this view.[217]

The powers of the liquidator are contained in the Companies Act and similar to those conferred on the Official Assignee. They include powers to investigate and examine, require disclosure of documents and records and generally to administer the liquidation.[218] The liquidator may seek directions from the Court on matters relating to the liquidation. As a general rule, the Court is reluctant to interfere with the commercial decision making power of a liquidator.

6.4.7.2 Liquidator's rights of action

Like the OA, a liquidator has a number of statutory powers to investigate and pursue transactions occurring in the period immediately prior to liquidation.[219]

These rights include the power to set aside voidable (insolvent) transactions,[220] voidable charges,[221] transactions at undervalue[222] transactions for inadequate or excessive consideration with directors and other persons,[223] and charges entered into with related parties.[224]

The general policies underpinning the rights to recover voidable transactions are well established. Outside *pari passu* distribution, the setting aside of preferential payments or transactions ensures the collective, orderly and cost-effective administration of a company when it is insolvent and ensures that the burden of loss is shared between all creditors. This in turn is said to discourage creditors from "stealing a march", particularly those who may have better bargaining position than smaller creditors.

The second category of claims allow a liquidator to swell the pool of assets available for distribution to creditors and shareholders. These types of claims are not focussed on whether someone has received a preferential effect but rather on reconstituting

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215 Companies Act, s 258.
216 *Idem*, s 260(2) (and see Sch 6).
217 *Idem*, s 258.
218 *Idem*, Sch 6.
219 Insolvency Act, Subpt 7, Pt 3.
220 Companies Act, s 292.
221 *Idem*, s 293.
222 *Idem*, s 297.
223 *Idem*, s 298.
224 *Idem*, s 299.

the pool of available assets in certain situations. These can include where there is a group of companies and pooling is appropriate,[225] where proper records have not been kept and loss has arisen as a result,[226] or where it is appropriate for directors or a manager or promoter to restore money or property to the pool of assets because their conduct has created loss to the company.[227]

In addition to the above, the liquidator may also continue to pursue claims that are vested in the company. These may include proceedings against third parties with whom the company had contracts with prior to liquidation, actions for breach of directors' duties and claims to recover dividends paid to shareholders.[228]

6.4.7.3 Process

In the cases of actions for voidable transactions (sections 292 and 293 of the Companies Act) or those claims at sections 297-299 of the Companies Act, the liquidator can take advantage of the Court procedural rules which provide for these claims to be brought through a simplified summary process under Part 19 of the High Court Rules. This process does not have the usual procedural requirements such as detailed pleadings or discovery and have a separate Court listing protocol, meaning they are generally heard sooner. Evidence is given by way of affidavit, though cross-examination is provided for under the Court rules.

Section 301 of the Companies Act provides a summary form of procedure whereby the Court may on the application of the liquidator, a creditor, or a shareholder, inquire into the conduct of the promoter, a present or former director, a manager, a liquidator, or a receiver to determine whether any of those persons have misapplied or have become accountable for any money or property of the company or have been guilty of negligence, default or breach of duty or trust in relation to the company.[229] If the Court determines that any of those people have been guilty of any of the matters referred to in this section, it may make an order for the repayment or restoration of the money or property misapplied or for the payment of compensation.[230] This is usually made in respect of the company; however, the Court can direct that repayment to a creditor directly, though that usually assumes that the creditor has a beneficial interest in the property itself and it has been misapplied.[231]

The High Court Rules also make provision for summary applications to the Court by liquidators for directions, or to enforce the liquidator's duties.[232]

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225 *Idem*, ss 271 and 272.
226 *Idem*, s 300.
227 *Idem*, s 301.
228 *Idem*, s 56.
229 *Idem*, s 301(1)(a).
230 The Court must, when making an order, take into account whether a person was acting as an administrator of the company.
231 *Mitchell v Hesketh* (1998) 8 NZCLC 261,559 (HC); *Drilling Fluid Equipment NZ Ltd v Falloon* HC New Plymouth CIV-2008-443-377, 27 March 2009 at [28].
232 See High Court Rules, Pt 19 – claims for recovery of transactions at undervalue (Companies Act, s 297), transactions for in adequate or excessive consideration with directors and certain other persons (Companies Act, s 298) and the Court may set aside certain securities and charges (Companies Act, s 299) may all be brought under the High Court Rules, Pt 19, which is generally a summary process without requirements (usually) for discovery or other procedural matters. The liquidator or Court may also bring an application for directions under ss 284 or 286 of the Companies Act, under Pt 19 of the High Court Rules.

6.4.7.4 Insolvent transactions

The liquidator may pursue insolvent or voidable transactions under the Companies Act.[233] Previously, the voidable regime in New Zealand allowed liquidators to impugn transactions entered into by the company in the two-year period immediately preceding liquidation,[234] where those transactions were "insolvent transactions". Insolvent transactions are those that are entered into at a time when the company is unable to pay its due debts and which result in a creditor receiving more than its entitlement in the liquidation. Transactions that can be reviewed and clawed back by the liquidator are widely defined; almost any conceivable transaction by a company is likely to be caught within the statutory definition.[235] Although the wording of the Companies Act appears on the face of it to only catch those by the company, it has long been held in New Zealand that payments by third parties on behalf of the company, may also be caught.[236]

The COVID-19 Response (Further Management Measures) Legislation Act 2020 (COVID 19 Act) [237] implemented various amendments to the Companies Act, including a shortening of the time period for recovery of insolvent transactions from an unrelated party to the six-month period preceding liquidation.[238] In the case of a related party, the voidable or relation back period remains two years.[239] As noted above, the liquidator must have regard to the continuing business relationship / running account principle in impugning a transaction. Only the net balance of the transaction can be the subject of an action under section 292.[240] As in Australia, there has been a significant amount of case law in this area about how the "running account" test should apply.

In addition, a transaction that has been made by a receiver and which discharges (wholly or in part) a liability for which the receiver is personally liable (either under section 32(1) of the Receiverships Act or otherwise under a contract entered into by the receiver), may not be challenged as a voidable insolvent transaction. However other transactions made by the company's receiver are open to challenge.

6.4.7.5 Insolvent charges

Prior to the amendments implemented by the COVID-19 Act, a liquidator could apply to set aside a charge granted two years immediately preceding the liquidation if, following the granting of the charge, the company was unable to pay its due debts.[241] Following the amendment, the voidable period has been reduced to six months ("the restricted period"), unless the charge was granted to a related party in which case the two-year period remains the voidable period.[242] The property and charge to which this section attracts is wide. Similar to the Insolvency Act, the liquidator is prevented

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233 Companies Act, s 292.
234 *Idem*, s 292(1) – Historic Version from 31 August 2012 to 15 May 2020.
235 *Idem*, s 292(3).
236 See *Robt Jones Holdings Ltd v McCullagh* [2018] NZCA 358 the Court of Appeal at [15].
237 See COVID-19 Response (Further Management Measures) Legislation Act 2020, Sch 2.
238 See Companies Act, s 292(1)(b) and (4C) – the period of six months is on top of any additional time that has run between the time of making the Court application to liquidate the company and the date of the Court order of liquidation itself. This provision ensures that the relation-back period remains "fixed" if a creditor steps out and another creditor substitutes in.
239 *Idem*, s 292(1A) and (5).
240 *Idem*, s 292(4B).
241 *Idem*, ss 293(1AA)(a) and 293(6).
242 *Idem*, s 291A; ss 293(1AA)(a) and 293(6).

from setting aside a charge where certain conditions are met. The exceptions largely mirror those discussed above.[243]

6.4.7.6 Transactions at undervalue

A liquidator may pursue transactions entered into by a company at undervalue in the specified period prior to liquidation (generally two years before liquidation).[244] The rationale is to ensure the liquidator can recover the true value of a transaction for the benefit of creditors because transactions at undervalue have diminished the pool of available assets.[245] The extent of the undervalue is calculated by reference to the statutory formula set out in the Companies Act.[246]

6.4.7.7 Transactions with related persons

On liquidation, a liquidator accrues a right of action related to transactions entered into with the director, relatives[247] or a related company[248] for inadequate or excessive consideration.[249] There is no requirement for a liquidator to establish that the company was insolvent at the time of the transaction. The period during which transactions are vulnerable is (generally) the three-year period prior to liquidation.[250] Like the other voidable provisions, additional time is built in where a Court application is required, to ensure the relation-back period also covers the period of time during which the Court is considering the application to liquidate. A party may defend a claim on the basis that consideration was adequate or not excessive.

6.4.7.8 Charges granted to related parties

The Court may set aside securities and charges granted in favour of related parties[251] (director,[252] a relative of the director, a related company controlled by the same director or relative or a related company) where the assets of a company are insufficient to meet all the debts of the company on a liquidation, and it is just and equitable for the Court to do so.[253] The Court has wide discretion and is entitled to take into account the circumstances in which the charge was created, the conduct of the person taking the security or charge or any other relevant circumstance.[254]

There is no requirement that the liquidator establish that the company was insolvent at the time the security or charge was taken.

6.4.7.9 Voidable dispositions and other actions

From 1 September 2020, the Companies Act includes provision for the disposition of a company's property to be voidable, if it is made during the specified period.[255]

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243 *Idem*, ss 293(1A) and s 293(5).
244 *Idem*, s 297(3)(b).
245 *Idem*, s 297.
246 *Idem*, s 297(1).
247 *Idem*, s 2.
248 *Idem*, s 298(1) and (2).
249 *Idem*, s 298.
250 *Idem*, s 298(4)(a) - (c).
251 *Idem*, s 299(1)(a) to 299(1)(d).
252 For the purposes of a s 299 recovery, the wider definition of "director" as set out at s 126 of the Companies Act is applied.
253 Companies Act, s 299.
254 *Idem*, s 299(1) – see, eg, *Petterson v Browne* [2016] NZCA 189.
255 *Idem*, s 296A. Section 296A has been inserted, as from 1 September 2020, by s 53 of the Insolvency Practitioners Regulation (Amendments) Act 2019 (2019 No 28). See cl 2, Insolvency Practitioners Regulation (Amendments) Act Commencement Order 2020 (LI 2020/145).

Subject to specified exceptions, a "disposition" for this purpose has the same meaning as in section 345 of the PLA. The exceptions are where the disposition is made in the ordinary course of business, by an administrator or deed of administrator (in the case of voluntary administration), or a receiver on behalf of the company, or under order of the Court.[256] The specified period is the period beginning on the date an application is made to liquidate the company and ending at the time a liquidator is appointed by the Court, or the Court otherwise disposes of the application. A court may make a range of orders on the application if the disposition is set aside.[257]

6.4.7.10 Procedure and defences

The process for cancelling insolvent transactions under sections 292, 293 and 296A is outlined at sections 294 and 296B of the Companies Act.

The process for these actions largely mirrors that set out above. Notice is given to the creditor by the liquidator. The creditor must object within the statutory time-frame, failing which the transaction is automatically set aside. If it is objected to, the liquidator must go through a formal process to set it aside. If not, the liquidator must obtain an order from the Court to recover the dollar value of the transaction, or the property at issue.

With respect to actions under section 299 of the Companies Act, the court rules make specific provision for the proceeding to be brought under the summary process at Part 19 of the High Court Rules. Although proceedings under sections 297 and 298 are not specifically provided for,[258] it is possible to seek permission of the Court to proceed under the same summary process.[259]

If a creditor can establish that it acted in good faith, a reasonable person in its position would not have suspected and it did not have reasonable grounds for suspecting that the company was, or would become, insolvent, and it gave value for the property or altered its position in the reasonable belief that the transaction would not be set aside, the Court must not order recovery.[260] A creditor facing an action by a liquidator under sections 295 to 299 of the Companies Act may seek to rely on the statutory defence at section 296 of the Companies Act.[261]

6.4.8 Other actions

6.4.8.1 Claims against directors – insolvent trading

As agent of the company, a liquidator may bring an action against the directors of a company for breach of duty.

Directors in New Zealand have a number of statutory duties set out in the Companies Act.[262] A breach of these duties can give rise to both civil liability and criminal liability.[263] The duties are not a complete code; common law principles continue to be relevant to assist with interpretation of the general principles under the Companies Act and to the extent the Companies Act does not address a particular duty or

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256 See Companies Act, s 296A(2) which came into force on 20 September 2020.
257 *Idem*, ss 296B and 296C – came into force on 20 September 2020.
258 High Court Rules, r 19.2.
259 *Idem*, r 19.5.
260 Companies Act, s 296(3).
261 *Idem*, s 296(3).
262 *Idem*, ss 131, 133, 134, 135, 136 and 137.
263 *Idem*, s 138A.

remedy for breach of duty. Fiduciary obligations continue to have application to the extent not modified by the statutory regime. The three most commonly pursued claims against directors following insolvency are:

- breach of duty to act in good faith and in the best interests of company;[264]
- breach of duty not to agree to, or to cause or allow, the business of a company being conducted in a manner likely to create substantial risk of serious loss to creditors;[265]
- breach of duty to not incur obligations unless the director believes on reasonable grounds that the company will be able to perform the obligation when it is required to do so.[266]

In interpreting the statutory provisions, the Courts in New Zealand have balanced the rights of directors to legitimate risk-taking, which are an incident of running a business, and illegitimate risk taking.[267] Only those risks which pose a substantial risk of serious loss to creditors, are of concern.[268]
A director may avoid liability by asserting by way of defence that he relied on the advice of professional advisors or other specified parties, where the reliance is in good faith, the circumstances did not call for further enquiry and had no knowledge that reliance was unwarranted.[269]

Where breach is established, the result is a right by the liquidator (as agent of the company) to recoup losses from the directors. In certain circumstances, criminal liability may also attach.[270]

Directors' duty claims can be problematic for liquidators. Presently, recoveries that arise as a result of such actions are classified as assets of the company because they are a chose in action which vest in the company. The result is that recoveries are payable to creditors with security over all of the company's assets.[271] In response to this, amendments were proposed at the end of 2019 to amend the Companies Act so that recoveries arising from a reckless trading claim are available to liquidators to meet unsecured creditor claims.

6.4.8.2 Safe-harbour

In May 2020, New Zealand introduced a temporary safe-harbour regime to protect directors against liability for breach of duty under sections 135 (reckless trading) and 136 of the Companies Act. The provisions provide directors with protection where they have elected to continue trading, and for decisions made to take on new obligations, for the period 3 April 2020 to 20 September 2020, if:

- in the good faith opinion of the directors, the company is facing (or is likely to face in the next six months) significant liquidity problems as a result of the impact of the COVID-19 pandemic; and

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[264] *Idem*, s 131.
[265] *Idem*, s 135.
[266] *Idem*, s 136.
[267] *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255.
[268] *Ibid*.
[269] Companies Act, s 138.
[270] *Idem*, s 138A.
[271] Subject to any salvage claim for costs.

- the company was able to pay its debts as they fell due in the normal course of business on 31 December 2019; and

- the directors consider in good faith that it is more likely than not that the company will be able to pay its debts as they fall due on and after 30 September 2021.

6.4.8.3 Contribution and pooling orders

In New Zealand, the Companies Act makes provision for the Court to require a contribution by related entities to a company in liquidation, or pool the assets of related companies in liquidation so that the liquidations are administered as one. The relevant sections are said to balance two competing policy considerations: "The first is that the separate corporate identity of the company in liquidation is to be respected. The second is that s 271 is directed to the mischief that an overly strict application of that separate corporate identity may cause."[272]

The Court may make an order on the application of a shareholder or creditor if it is just and equitable to do so. The Court may make two types of orders:

- that a company related to a company in liquidation, but not itself in liquidation, pay all or part of the claims made in the liquidation (a contribution order);[273] or

- that the liquidation of two related companies proceed as one (pooling order).[274]

In deciding whether an order should be made, the Court must have regard to those matters set out in section 272 of the Companies Act.[275]

Orders under section 271 of the Companies Act may be made in relation to holding companies or their subsidiary, a company with more than half of the issued shares of the first company, a company whose members hold more than half of the issued shares of the first company (whether directly or indirectly) or another company to which the other company and the first company are related.[276]

6.4.9 Winding up and dissolution

Once all assets have been realised, assuming termination has not occurred as a result of a court application, the liquidation is completed by the liquidator attending to those statutory requirements set out in the Companies Act[277] or otherwise delivering to the Registrar a copy of a Court order mandated under the Companies Act.

A liquidator must also seek to have his or her remuneration approved by the Court.[278]

At the end of a liquidation, the liquidator must prepare and send to every creditor whose claim has been admitted, and to every shareholder, a final report which includes a final statement of realisations and distributions. A statutory statement is

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[272] *Lewis Holdings Ltd v Steel & Tube Holdings Ltd* [2014] NZHC 3311, [2015] 2 NZLR 831 at [20], affirmed by *Steel & Tube Holdings Ltd v Lewis Holdings Ltd* [2016] NZCA 366 at [27].
[273] Companies Act, s 271(1)(a).
[274] *Idem*, s 271(1)(b).
[275] *Idem*, s 272.
[276] See the Companies Act 1993, s 2(3), for the definition of a related company.
[277] Companies Act, ss 249 and 257(1)(a).
[278] A liquidator's rates are usually prospectively approved. The total remuneration is approved at the end of a liquidation retrospectively.

required which includes a statement that the company will be removed from the company's register and the grounds on which a creditor or shareholder may object.[279] The reports and other documents required must be sent to the Registrar for registration.

Alternatively, a liquidator may also deliver a Court order to the Registrar exempting a liquidator from complying with the provisions of section 257(1)(a) of the Companies Act.

Once the Registrar receives the documents, notice of intention to remove the company from the register is given by the Registrar. Once the statutory time period has run for objections to be filed, the company will be de-registered.[280]

Self-Assessment Exercise 4

Question 1

In what ways can a company be put into liquidation in New Zealand?

Question 2

What actions are available to a liquidator to recover assets for the benefit of creditors?

Question 3

How are realised assets distributed to creditors?

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

6.5 Corporate rescue

6.5.1 Introduction

The Companies Act contains three statutory procedures relating to corporate rescue and rehabilitation: Compromises (Part 14 and Part 15) and Voluntary Administration (VA) (Part 15A). A fourth process, statutory management, is also covered under this section. Business debt hibernation (BDH) was also introduced earlier this year in response to COVID 19.

There are two main gateways to corporate rescue. Voluntary appointments or proposals, which are agreed to by creditors, or involuntary appointments (where appointment occurs through the appointment by a third party that is not the debtor company, for example, a secured creditor, the Court, or the Crown).

[279] Companies Act, s 257(1)(a).
[280] *Idem*, ss 320 and 321.

There is no legal obligation for a corporate entity to participate in, or file for, a corporate rescue process. Corporate rescue processes will usually only apply to incorporated companies.

6.5.2 Compromises – Part 14

6.5.2.1 Introduction

A compromise is defined under the Companies Act.[281] The definition is not exhaustive and can include a proposal to vary a party's rights in relation to part of a debt (either in relation to a creditors' rights or terms of a debt or by cancellation) or constitutional changes that affect the likelihood of a company being able to pay a debt.[282]

Compromises in New Zealand can either be achieved because the statutory majority of creditors have voted in favour of the compromise in number and value,[283] or through an application by a creditor or shareholder to the Court, to have a compromise approved by the Court.[284]

Compromises are rarely used in New Zealand.[285] Possible reasons include the perceived costs of putting together the compromise and organising for it to be circulated. It has also been suggested that Part 14 compromises have limited utility given there is no automatic moratorium imposed on creditors for the period between the circulation of the proposed compromise and the date of voting.

6.5.2.2 Part 14 compromise

Part 14 of the Companies Act enables certain specified parties to propose a compromise with the creditors of a company that is unable to pay its debts. The policy behind Part 14 is to give effect to a "fair business assessment" reflecting the "common interest of all those who are to be bound by" the compromise.[286]

The board, a receiver and a liquidator of a company may propose a compromise as of right, provided they believe that the company is, or will be unable to, pay its debts within the meaning of section 287 of the Companies Act.[287]

Creditors or shareholders who wish to propose a compromise must first obtain leave of the Court. The party putting forward the compromise is referred to as the "proponent". If a compromise is proposed by a creditor or shareholder, there is no express right for the company to oppose or otherwise comment on the compromise.[288]

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281 *Idem*, s 227.
282 *Ibid*.
283 Companies Act, Pt 14, majority in number voting, representing 75% value of debt – see s 230 and Sch 5, Cl 5(2).
284 Companies Act, Pt 15.
285 Law Commission, *Insolvency Law Reform: Promoting Trust and Confidence* (NZLC SP11, 2001) at 70–71 (available at www.lawcom.govt.nz/our-projects/insolvency.com).
286 *Trends Publishing International Ltd v Advicewise People Ltd* [2018] NZCCLR 24, at [66].
287 Section 287 of the Companies Act states that a company is presumed (unless the contrary is proven) to be unable to pay its due debts if the company has failed to comply with a statutory demand, execution issued against the company in respect of a judgment debt has been returned unsatisfied in whole or in part, a person entitled to a charge over all or substantially all of the property of the company has appointed a receiver under the instrument creating the charge, or a compromise between a company and its creditors has been put to a vote in accordance with Pt 14, but has not been approved.
288 *Seaview Nurseries Ltd v Wholesale Tree Co Ltd* HC Auckland M 982-94, 19 October 1994.

6.5.2.3 Terms of a compromise

As noted above, a compromise can include a number of terms. The compromise does not need to include all of the creditors of the company. However, all those known creditors who stand to be affected by the compromise are entitled to be notified and vote on the compromise.[289] Different treatment of creditors, including the exclusion of certain creditors from the compromise altogether, may be taken into consideration by the Court if a creditor asserts it is unfairly prejudiced for the purposes of section 232(3)(c).[290]

6.5.2.4 Process

The proponent must compile a list of creditors known to the proponent who are affected by the proposed compromise. The list must include the amounts owed (actual or estimated) to each of the creditors as well as the number of votes each of the creditors would be entitled to cast.[291] The Courts have noted that "affected creditors" under the Companies Act for the purposes of Part 14 are any creditors whose legal rights or economic interests would be affected by the proposed compromise.[292] The definition of creditor is the same as that used for the purposes of liquidation.

The proponent must give notice of a meeting to creditors. The Companies Act prescribes the notice requirements and the information that must be provided to creditors.[293]

Creditors may need to be divided into different classes in order to prevent oppression of minority creditors. Classes are intended to "appropriately bind those who voted against them" in accordance with the policy of the Companies Act.[294] Improper classification of creditors can give rise to a "material irregularity in obtaining approval of the compromise" or a finding that a compromise is unfairly prejudicial to that creditor and / or class of creditors for the purposes of section 232(3)(b) and (c).[295]

A compromise will be adopted if the majority in number and 75% in value of creditors actually voting, vote in favour of the proposal at the meeting. Each class of creditor votes separately and, unless the contrary is stated, the presumption is that all classes must vote in favour of the compromise for it to be approved.[296]

If passed (and provided all creditors were given proper notice of the proposal), the compromise is binding on all creditors (in the event there is only one class or all classes approve the compromise), or all creditors of a class (in the event that class approves the compromise and the terms of the compromise expressly allow approval without the need for consensus from all classes). A creditor who is dissatisfied may seek relief from the Court against the effects of a compromise in certain circumstances.

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289 *The Bank of Tokyo-Mitsubishi UFJ Ltd v Solid Energy New Zealand Ltd* [2013] NZHC 3458 at [127]-[141].
290 *Idem*, at [151].
291 Companies Act, s 229.
292 *The Bank of Tokyo-Mitsubishi UFJ Ltd v Solid Energy New Zealand Ltd* [2013] NZHC 3458 at [139].
293 Companies Act, ss 229(1), (2)(a) and (2)(b).
294 *Trends Publishing International Ltd v Advicewise People Ltd* [2018] NZCCLR 24 at [65].
295 *Idem*, at [122].
296 Companies Act, s 230(3).

The Court may order that the creditor is not bound by the compromise, or make such other order as it thinks fit, if a creditor can establish any of the grounds set out in section 232(3) of the Companies Act.

6.5.3 *Part 15 compromise*

A compromise under Part 15 arises through the Court process. The Court may approve a compromise despite the fact that a Part 14 compromise could have been utilised first.[297] A creditor, shareholder or other interested party has standing to make the application. The Court has a broad discretion to make a range of orders, including pre-approval orders.[298] Additional rules apply under Part 15 to the voting rights of a code company.[299]

The power of the Court to approve the compromise is set out in section 236(1) of the Companies Act. It is wide and has been subject to a number of Court decisions in the past. Various tests have been proposed, including an "intelligent and honest business person" test,[300] or a test which constrained the Courts to a degree of assessment in respect of the more procedural requirements.[301] In approving a compromise, the Court may also prescribe conditions for its operation.[302]

6.5.4 *Business debt hibernation (BDH)*

The COVID 19 Act introduced business debt hibernation as a form of compromise. In many respects, it operates in the same manner as an administration, but on a smaller scale. It was intended to give businesses which were facing financial difficulties due to COVID-19, an opportunity to avoid liquidation, receivership or formal insolvency processes instigated by creditors. The data to date shows that the BDH scheme has had slow uptake.[303]

In addition to companies, BDH may also be utilised by limited partnerships, other body corporates, partnerships and unincorporated bodies of persons. Banks and insurance companies are excluded from BDH.

In short, BDH imposes a temporary moratorium while the business negotiates an arrangement with creditors to allow the company to trade through. The moratorium prevents most creditors from enforcing debts or charges over the business's property for an initial period of up to one month. During this period, the company is required to put a proposal or arrangement to creditors, which must be voted in favour of by the majority of creditors (50% in value and majority in number).

To be eligible for BDH, a company must be able to demonstrate that as at 31 December 2019, it was able to pay its debts as they fell due. 80% of the directors must approve the company using BDH and these directors must certify that the company was able to pay its debts as they fell due as at 31 December 2019. They must also state in the certificate that in their good faith opinion the entity has, or is likely to have, significant liquidity problems as a result of the effects of COVID-19 and the entity is more likely than not to be able to pay its due debts on and after 30 September 2021. In taking these steps, the directors must act in good faith.

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297 *Idem*, s 236.
298 *Idem*, s 236(2).
299 See s 2A(1) of the Takeovers Act 1993. See also ss 236A(2) and 236B of the Companies Act.
300 See *CM Banks Ltd* [1944] NZLR 248 (SC).
301 *Weatherston v Waltus Property Investments Ltd* [2001] 2 NZLR 103 (CA), at [34].
302 Companies Act, s 237.
303 https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12349592.

Unlike voluntary administration, BDH is a proposal which is largely controlled by the company. To instigate BDH, a company gives notice to the Registrar that the company has resolved to place the company into BDH.[304] From the date of giving notice, there is an initial protection period during which the moratorium is in place. This will last up until creditors vote on the proposal, or the end of one month after notice is given to the Registrar, whichever occurs first. If the BDH proposal is accepted by creditors, the protection period can be extended for another six months from the date of approval. The BDH proposal will bind all creditors to whom it was sent, other than employees and debts incurred after the BDH was approved.

Secured creditors holding a general security over all of a company's assets are not bound by the moratorium. The legislation also includes provisions that deal specifically with the rights of secured creditors, owners and lessors of property and rights under guarantees. Many of these rights cannot be enforced without the permission of the Court or the entity at issue.

There are a number of restrictions on what can be included in the BDH proposal. One of the key restrictions is that the BDH proposal cannot include a term that has the effect of cancelling all or part of a debt (payments can however be deferred).

The protection mechanisms come to an end if the requisite certifications are not provided to the Registrar, the BDH is not approved within the month or a debtor does not comply with the terms of the BDH.

6.5.5 Voluntary administration

6.5.5.1 Introduction

New Zealand's voluntary administration (VA) regime is largely modelled on the Australian legislative provisions. The primary objective of voluntary administration is the maximisation of the insolvent company's prospects, or as much as possible of its business, continuing in existence under the terms of a deed of company arrangement (DOCA). If that is not possible, the goal is to administer the business and affairs of the company in such as way so that it results in a better return to creditors than immediate liquidation.[305] The process has not received the same traction in New Zealand as in Australia. Possible reasons for this include the lack of preferential status for the Inland Revenue Department (IRD) (New Zealand's tax department) under VA.[306] Other possible reasons include the larger proportion of small and medium enterprises (SMEs) in New Zealand which are less likely to able to sustain the cost of a VA.

Despite New Zealand basing the VA regime on the Australian process, there are a number of differences. Significantly, New Zealand has different rules around the specified majority requirements and the casting vote of the administrator.[307] Other differences include provisions that administration can also be brought about in various other ways not provided for in Australia,[308] the administration of related entities are able to proceed through joint meetings[309] and the adopting of pooling

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304 In the case of a company, 80% of the directors must approve the resolution.
305 Companies Act, s 239A.
306 The IRD receives preferential status under Sch 7 of the Companies Act in liquidation, meaning there is little incentive for the IRD to vote in support of a deed of company arrangement as its debt claim would be elevated in the course of the liquidation.
307 The administrator may exercise a casting vote – see s 239AK(3) of the Companies Act.
308 Companies Act, s 239AL.
309 *Idem*, s 239AL.

provisions provided for in liquidation. Additionally, secured creditors may be regulated by the Court once a DOCA has been executed.[310]

One of the key benefits of the VA regime is the moratorium that arises once an administrator is appointed. The moratorium provides the company with relief from creditor action while various options are explored. The moratorium is not absolute and secured creditors with security over substantially the whole of a corporate entity's assets, retain enforcement rights for a period of time. In practical terms, this generally means that VA has little utility unless there is support by the major secured creditors.

The term "administration" refers to the period following the appointment of an administrator, up until the creditors make a decision as to the fate of the company. The commencement of voluntary administration operates as a precursor to the company either executing and implementing a DOCA, or otherwise being returned to its directors or proceeding to immediate liquidation. Which outcome takes place depends on the decision reached by creditors at a meeting called by the voluntary administrator. The term "administrator" is used to describe the person appointed to administer the company until a decision is made at the watershed meeting. The "deed administrator" is the person appointed by creditors to implement the DOCA, if it is approved. The watershed meeting is the meeting at which creditors vote on the future of the company and the convening period is the statutory period provided to the administrator to call the watershed meeting.

Although appointment of an administrator can occur through the Court, as a general rule, there is no requirement that any documentation be filed in Court. The administrator must be appointed in writing and must consent to the appointment in writing. Once appointed, the assets and affairs of the company are in the control of the administrator.

6.5.5.2 Appointment

As the name suggests, the regime is intended to be a voluntary rehabilitation process. Accordingly, the normal method by which a voluntary administrator is appointed is through appointment by the Board or shareholder resolution.[311] A liquidator or interim liquidator may also bring about a VA.[312]

An administrator may be appointed by:

- The Board, by the passing of a resolution which states that in the opinion of the directors voting for the resolution, that the company is insolvent or may become insolvent and that an administrator should be appointed.[313]

- A liquidator or interim liquidator on the basis of insolvency. One reason this may occur is where a liquidator is seeking to sell a business as a going concern and wishes to take advantage of the moratorium arising in a VA.

- A secured creditor holding a charge or security over the whole or substantially the whole of a company's assets may appoint an administrator where its rights

310 *Idem*, s 239ACV.
311 Companies Act, ss 239H(1)(a) and 239I.
312 *Idem*, ss 239H(1)(b) and (c) and 239J.
313 *Idem*, s 239I(1)(a).

have become enforceable.[314] The appointment is made by the secured creditor in writing. A secured creditor cannot exercise this right if a company is already in liquidation.[315] The secured creditor must also give notice in writing.

- A forced process, either through appointment by a secured creditor,[316] or the Court on the application by a creditor, the liquidator, the Financial Markets Authority (FMA) or the Registrar of Companies.[317] The Court may appoint where it is satisfied that the company is, or may become, insolvent and the administration will result in a better return for creditors than immediate liquidation, or it is just and equitable to do so.[318]

Once appointment has occurred, it cannot be revoked by the appointing party, though the administrator may be removed by the Court or creditors.[319]

As with liquidation, the proposed appointee must consent in writing.[320] A natural person who is not otherwise disqualified under the Companies Act may be appointed. Similar restrictions to those that apply in a liquidation also apply to an administrator.[321]

6.5.5.3 Commencement and administration period

The administration of a company commences when the administrator is appointed.

The administration will come to an end in three circumstances: i) when the deed of company arrangement is agreed on or executed by the company and the deed administrator, ii) where creditors resolve to bring the administration to an end before the watershed meeting,[322] or iii) where the creditors resolve to put the company into liquidation at a watershed meeting.[323] The Court may also end an administration if it is satisfied a company is solvent, or if it believes that liquidation is inevitable.[324]

6.5.5.4 Consequences of appointment

Control of assets and business affairs

On appointment, the administrator takes control of the business and property of the company. The administrator may carry out and manage the affairs of the company and terminate, or dispose of all or part of that business, and may dispose of property.[325]

The administrator may perform any function and exercise any power that the company or its officers could perform or exercise as though the company was not in administration. Any dealings or transactions by a company in administration is void

314 *Idem*, s 239K. See also s 2.
315 *Idem*, s 239K(3) and see also s 2.
316 *Idem*, ss 239H(1)(d) and 239K.
317 *Idem*, s 239L(1).
318 *Idem*, s 239L(2) and see also s 2.
319 *Idem*, ss 239M(1) and 239(M(2).
320 *Idem*, s 239G.
321 *Idem*, s 239F. See also s 280.
322 *Idem*, s 239E(1)(b).
323 *Idem*, s 239E(1)(c).
324 *Idem*, s 239E(1)(a).
325 *Idem*, s 239U.

unless entered into by the administrator on behalf of the company, or with the administrator's consent.[326]

Directors remain in office, however, although their powers are restricted from the time administration commences.[327] Directors may not perform or exercise any function or power other than with the administrator's written approval.[328] Directors are also required to comply with certain obligations, including the provision of a statement of financial position, deliver books and records and to attend the watershed meeting.

A share in the company whilst in administration must not be transferred and the rights and liabilities of the shareholders of the company must not be altered while the administration remains extant.

Effect on liquidation or receivership

An administrator can be appointed to a company in liquidation or receivership. The appointment of an administrator to a company in liquidation will suspend the liquidation and the liquidator's agency to act for the company, but does not remove the liquidator from office.[329] An administrator appointed to a company in receivership does not affect a receiver already appointed to the company or its assets; however, the Court may limit the powers exercisable by the receiver.[330]

Moratorium

On the commencement of administration, subject to limited exceptions, enforcement actions against the company or its property are suspended unless the administrator consents to the action, or the Court gives its permission.[331] This includes proceedings against the company,[332] recovery of any leased property,[333] enforcement of a charge against a company,[334] or asset utilised by the company in its trade.

The moratorium commences from the appointment of the administrator and ends at the watershed meeting (or any extended date for the watershed meeting). The moratorium serves two purposes: i) it prevents the preferential treatment of creditors or disposition of property while the administration is in progress and ii) it ensures that the role of the administrator can be performed without impediment.

The main exceptions to the moratorium are:

- Secured creditors with security over the whole or substantially the whole of a company's property. The secured creditors may enforce rights for a period of up to 10 working days after commencement of the administration.[335] In New Zealand an administrator is unlikely to be appointed unless major secured creditors have been consulted by the board and are supportive of the appointment. A recent court decision suggests that the "decision period" can be

326 *Idem*, s 239Z(1).
327 *Idem*, s 239X(1).
328 *Idem*, s 239X(2)(a).
329 *Idem*, s 239AC.
330 *Idem*, s 239ABS.
331 *Idem*, ss 239ABE and 239ABG. The former is concerned with Court proceedings and the latter with enforcement action against property.
332 *Idem*, s 239ABE.
333 *Idem*, s 239ABD.
334 *Idem*, s 239ABC.
335 *Idem*, s 239ABK.

extended through the written consent procedure set out at section 239ABC(a) of the Companies Act.[336]

- Secured creditors who commenced enforcement action prior to the appointment.[337] The Court will grant an order limiting the secured creditor's rights, or a receiver's powers, if the interests of these parties are adequately protected.[338]

- Perishable goods – there is no moratorium against entitled persons (a receiver, secured creditor or other entitled person) from enforcing a charge over perishable property.[339]

A creditor holding a guarantee against the directors, or their spouses or relatives, is also prevented from enforcing under the guarantee without leave being granted by the Court.[340]

6.5.5.5 Powers and duties of administrator

Administrator's role and powers

The administrator's role is set out in the Companies Act. This section provides that the administrator controls the company's business, property and affairs, carries out the business of the company, terminates and disposes of all or any part of the business and its property and do anything the company or its officers could have done, but for the administration.[341]

The administrator is given a number of statutory powers to achieve the objectives of the VA regime.[342] To maximise the prospects of the company continuing in existence or return to creditors, the administrator is conferred a wide range of powers. Broadly, they are similar to those conferred on the OA or liquidator.[343] In exercising his or her powers, the administrator must have regard to the interests of the company's creditors and shareholders taking account for that purpose the objects of the administration.

Unlike a liquidator, an administrator does not have powers to disclaim contracts. The administrator may however cause the company to repudiate existing pre-appointment contracts. Other than limited exceptions for rent[344] and wages,[345] the administrator does not have personal liability for pre-existing contracts. Administrators will however incur personal liability for any contracts expressly adopted or debts incurred in the performance or exercise of his or her power in the administration in respect of funding the company, services rendered, goods purchased or property hired, leased or occupied.

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336 *Re Williams* [2019] NZHC 1960 at [14].
337 Companies Act, ss 239ABM and 239ABO.
338 *Idem*, s 239ABO(3).
339 *Idem*, s 239ABN.
340 *Idem*, s 239ABJ(1).
341 *Idem*, s 239U.
342 *Idem*, s 239A.
343 *Idem*, s 239AV.
344 *Idem*, s 239I(2) – personal liability for rent of property or equipment will also attract under existing lease arrangements for the period seven days after appointment, up until the property is no longer used or occupied. The administrator has the power to issue a non-use notice.
345 *Idem*, s 239Y. Employment contracts are not automatically terminated.

Other than provided for in the Companies Act, no other personal liability accrues to the administrator. No preference is provided to lenders who inject further funds, though if a party did this, it would be expected that provision would be made for priority to be given to the debt in the DOCA.

The administrator has an indemnity against the company's assets for liabilities incurred and remuneration. This indemnity has priority over unsecured claims and claims secured by a charge over property as set out above. An administrator also has a right to claim a lien over the assets of the company to secure the right to the indemnity for fees and expenses.

Transactions entered into by a company in administration will not be voidable by a liquidator where they are carried out by or with the consent and authority of the administrator. The same protections are also provided for transactions carried out by a deed administrator.[346] Similarly, transactions by the administrator entered into in good faith will not be set aside.[347]

Administrator's duties

The administrator's statutory duties include a duty to:

- give notice of his or her appointment by lodging a notice of appointment with the Registrar and advertising the appointment;[348]
- call for creditor claims and determine them for the purposes of voting;
- notify secured creditors who whole security over the whole or substantially the whole of the company's property;[349]
- investigate the company's affairs and consider a possible course of action and specifically whether it would be in the interests of creditors to execute a DOCA, terminate the administration, or appoint a liquidator and to provide a report on this to creditors in the notice convening a watershed meeting;[350]
- notify the Registrar of suspected offences committed by a past or present director, officer or shareholder of a company;[351]
- file accounts.[352]

6.5.5.6 Creditor claims

For the purposes of the VA provisions, Part 15A adopts the same definition of "creditor" as set out in the liquidation provisions in the Companies Act. The same process is utilised generally for creditor claims, though the compressed timeframe for the initial meeting and watershed meeting means in practice that administrators are much more reliant on directors and officers providing information about creditors of the company so they can be assessed for voting purposes. An administrator may estimate claims for the purposes of voting if the value of the claim is uncertain. As in

346 *Idem*, s 239ACB(1) and (2).
347 *Idem*, s 239ACA.
348 *Idem*, s 239ADW(1)(a) and (b).
349 *Idem*, s 239ADW(1)(c).
350 *Idem*, ss 239AE(a) and 239AU(3)(b).
351 *Idem*, s 239AI(1).
352 *Idem*, s 239ACZ(1).

liquidation, a creditor who is aggrieved may challenge the estimate through the Court.

6.5.5.7 Initial meeting and watershed meeting

The Companies Act obliges the administrator to hold two meetings.

The initial meeting is called to allow creditors to vote on the replacement of the administrator and whether to appoint a creditors' committee. An administrator is required to give notice of this meeting[353] and hold this meeting within eight working days after the date of appointment. [354] At the first meeting, the administrator is required to table an interests table.[355] From 1 September 2020, additional information needs to be provided by the administrator, including the written consent and statutory certificate required under the new section 239G and a notice regarding license requirements.[356] A creditors' committee may be implemented at the first meeting to consult with the administrator about matters related to the administration and to receive and consider reports by the administrator.[357] Though they are entitled to consult, as in liquidation the committee has no standing to give directions to an administrator.[358]

The second meeting is known as the watershed meeting. The watershed meeting must be held no later than 25 working days after the date of appointment.[359] The administration will automatically come to an end if the convened period passes without a watershed meeting occurring and the Court has not made an order to extend time for the convening period. The watershed meeting may be adjourned for a period of no more than 30 working days after the first day on which the meeting was held, without Court approval.[360]

The convening period of 20 working days under the Companies Act may be extended by the Court on the application of the administrator.[361] An extension is usually sought where additional time is required for an administrator to prepare the report and statement setting out his or her opinion on the future of the company.[362] The extension may be sought with retrospective effect.[363] There is no fixed rule about the duration of the extension. The Court in New Zealand has been willing to exercise its powers in a relatively flexible manner, in order to give effective to the objectives of the VA regime.[364]

The process to be followed at meetings is partially covered by Schedule 5 of the Companies Act.[365] The voting requirement to pass a resolution is a simple majority in value and debt of creditors. The administrator has a casting vote if there is a

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353 *Idem*, s 239AO.
354 *Idem*, s 239AN.
355 *Idem*, s 239AP.
356 Section 239AP of the Companies Act is to be replaced, as from 1 September 2020, by s 14 of the Insolvency Practitioners Regulation (Amendments) Act 2019. See cl 2 of the Insolvency Practitioners Regulation (Amendments) Act Commencement Order 2020 (LI 2020/145).
357 Companies Act, s 239AQ(1).
358 *Idem*, s 239AQ(2).
359 *Idem*, s 239AT.
360 *Idem*, s 239AZ.
361 *Idem*, s 239AT(3).
362 *Idem*, s 239AU.
363 See *Chief Executive of the Ministry of Fisheries v E and B Management Ltd (admin apptd)* [2011] NZCCLR 18 (HC) at [51].
364 *Re Nylex (New Zealand) Ltd* HC Auckland CIV-2009-404-1217, 11 March 2009 at [22]. See also *Re WGL Retail Holdings Ltd* [2, 011] NZCCLR 29.
365 Clauses 4, 6, 7, 8, 10 and 11 of Sch 5 apply. See s 239AK of the Companies Act.

deadlock at a creditors' meeting.[366] The Court may intervene if the outcome of a vote has been determined by a related party vote.[367]

Where there are related entities in administration, the administrators of the related companies may call for the meetings to occur at the same time and place. The Court may also, where it is just and equitable to do so, make orders to enable the administration of two or more related entities to proceed as a single administration.

6.5.5.8 Decision of creditors at watershed meeting

The VA regime is a process that gives creditors a degree of control over the fate of company's future. The fate of a company's future is decided by creditors at the watershed meeting. Creditors have three options:[368]

- to resolve that the company should execute a DOCA;
- to resolve that the administration should end. The effect of such a resolution is that the company will return to the control of its directors; or
- unless the company is already in liquidation, to resolve to appoint a liquidator.

The administrator is tasked with making a recommendation as to which of these options he or she believes is suitable in each circumstance. The directors of the company are required to attend the watershed meeting, though they cannot be compelled to answer questions at the meeting.[369]

6.5.5.9 Process for putting together deed of company arrangement

A DOCA sets out the terms on which a company will operate and how creditors' rights will be compromised and / or addressed if the business continues in existence. The terms and form of the DOCA will vary depending on the circumstances and may contain a compromise or terms allowing for an orderly winding up.

The DOCA is prepared by the person who will be the deed administrator if the DOCA is approved. The statutory presumption is that the administrator will be the deed administrator unless creditors appoint another person.[370] The deed administrator must consent in writing to the appointment.[371] The same rules that apply to administrators apply with respect to a prohibition on revocation, dual appointments and eligibility to act. A DOCA administrator may resign by giving written notice[372] and may be removed by the Court.[373]

In giving the notice for the watershed meeting, if a DOCA is proposed, the administrator is required to provide a statement that sets out the details of the proposed DOCA.[374] It is not necessary for the form of the proposal to be settled and it is possible that creditors may seek amendment to it at the watershed meeting.

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366 Companies Act, s 239AK(3).
367 *Idem*, s 239AM.
368 *Idem*, s 239ABA.
369 *Idem*, s 239AW(1).
370 *Idem*, s 239ACC.
371 *Idem*, s 239ACE.
372 *Idem*, s 239ACI.
373 *Idem*, s 239ACJ(1)(a) and (2).
374 *Idem*, s 239AU(3)(c).

There are a number of mandatory matters that must be set out in the DOCA and which are prescribed under the Companies Act.[375] This includes what property is available to pay creditors, the nature of any moratorium and the duration, the extent of any release of liability in respect of debts, the conditions that are to apply for the deed to come into operation and continue in operation, and how the DOCA can terminate. The provisions set out in the Companies (Voluntary Administration) Regulations 2007 are also treated as incorporated into the DOCA, unless expressly excluded.[376]

The administrator may also seek the approval of the Court to "pool" owners of property as a separate class of creditors for the purposes of voting at the watershed meeting.[377] Different voting majorities are required for pooled property owners, being a majority in number representing 75% value in debt.[378] Other than this provision, there is no other express power for the Court to make an order that creditors vote by separate classes. The pooled property owners will be bound by the DOCA only if:

- the Court has ordered that the pooled property owners be treated as a separate class;
- the creditors (inclusive of the pooled property owners) must have approved the resolution for the deed of company arrangement at the watershed meeting; and
- the requisite majority of pooled property owners must have been included in the creditors that voted in favour of the resolution.

If creditors resolve to adopt a DOCA but the terms have not been fully approved at the watershed meeting, the DOCA must be prepared and circulated to creditors within 10 working days of the watershed meeting (or any extended period) ("interim period").[379] During the interim period, creditors who will be bound by the DOCA cannot take any steps that are contrary to the DOCA.[380] Once circulated, creditors have a three working day period to inspect and provide comments on the proposed DOCA.[381] The DOCA must be executed within a further two working day period after the inspection period expires (unless extended by the Court).[382]

If a company fails to execute the proposed DOCA within the statutory timeframe, the administration ends and the administrator is required to apply for the liquidation of the company.[383]

Once the DOCA is executed, notice of this must be given to creditors and the fact must be advertised. The DOCA must be filed with the Registrar of Companies.[384] The fact that the company is subject to a DOCA must also be disclosed and the words "subject to a deed of company arrangement" must appear after the company's name

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375 *Idem*, s 239ACN(2).
376 *Idem*, s 239ACN(3).
377 *Idem*, s 239AY(1).
378 *Idem*, s 239AY(2).
379 *Idem*, s 239ACP(1)(a). This can be extended for a further 10 working day period by the Court – s 239ACP(2). See also s 239ACQ(2) of the Companies Act 1993 for "interim period".
380 Subject to any court orders – see s 239ACQ(2) of the Companies Act 1993.
381 Companies Act, s 239ACP(1)(b).
382 *Idem*, s 239ACP(2).
383 *Idem*, s 239ACR. Note, however, that this time period can be extended by the Court under s 239ADO.
384 *Idem*, s 239ADY.

where a document is signed for the first time and creates a legal obligation for the company.[385]

6.5.5.10 Effect of deed of company arrangement

Once executed, the DOCA binds the creditors (to the extent set out in the Companies Act),[386] the company, directors / officers and shareholders of the company and the deed administrator.

The general position is that the DOCA will only bind creditors with respect to claims that arise before the "cut-off" date, a date specified in the DOCA as being the date at which claims are "admitted" for the purposes of the DOCA. Creditors who vote against the DOCA are only bound to the extent the DOCA addresses claims they have against the company.

A DOCA will also not bind secured creditors and owners / lessors of property,[387] unless they voted in favour of the resolution at the watershed meeting to implement the DOCA, or where the Court orders otherwise.[388]

While a DOCA remains in force, parties bound by the DOCA may not continue with action to liquidate the company or, without the Court's permission, commence a proceeding against the company or its property, or continue an enforcement process.[389]

The DOCA will otherwise only release a company from its debts to the extent provided for in the DOCA.[390] The general rules of set-off that apply in liquidation also apply to creditor claims under a DOCA.[391]

A DOCA can be varied either by a resolution of creditors or by an order of the Court.[392] The Court may also determine the validity of a DOCA.

Similarly, a DOCA may also be terminated by the creditors through a validly passed resolution,[393] the Court,[394] or as automatically as provided for in the DOCA.[395] The grounds on which the Court may terminate a DOCA are specified in the Companies Act. Generally, this discretion can be exercised where material information was either misrepresented or omitted.[396]

6.5.5.11 Conversion to liquidation

A liquidator can be appointed to a company in administration by the Court or by creditors' resolution. The Court's discretion can be exercised to liquidate where it is inevitable that the company will eventually be put into liquidation because it is insolvent. The Court may also appoint an interim liquidator where appropriate. The appointment of a liquidator will bring the administration to an end.

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385 *Idem*, s 239AEB(1)(b).
386 *Idem*, s 239ACT.
387 *Idem*, s 239ACT(2)(a).
388 *Idem*, s 239ACV(1)(a) or (b).
389 *Idem*, s 239ACU(1).
390 *Idem*, s 239ACW(1)(a) and (b).
391 *Idem*, s 239AEG.
392 *Idem*, ss 239ADA, 239ACX and 239ADO.
393 *Idem*, s 239ADE(1).
394 *Idem*, s 239ADD(2).
395 *Idem*, s 239ACN(2)(g).
396 *Idem*, s 129ADD(4).

6.5.6 Statutory management

6.5.6.1 Introduction

Statutory management is rarely used in New Zealand and does not have a comparable equivalent in other commonwealth jurisdictions. Statutory management occurs largely in the context of corporate insolvency, but can apply to individuals also. Statutory management is governed by the Corporations IM Act.[397] Similar regimes also exist under the Reserve Bank of New Zealand Act 1989[398] and Insurance (Prudential Supervision) Act 2010.[399]

The purpose of the Corporations IM Act is to provide a procedure that deals with corporate failure which is of such a magnitude that normal legal procedures that would otherwise be available are inadequate.[400]

The main objectives are to allow for the investigations of the affairs of the corporation, to limit or prevent risk of further financial deterioration or the further conduct of fraudulent acts or activities, to preserve stakeholder interests and to provide for the orderly and expeditious wind-down of a corporation.
The participation of creditors in the statutory management process is extremely limited. They do not have a say in the future of the corporation. This is determined by the manager, following appointment.

It is possible for a corporation to survive statutory management, but more commonly statutory managers exercise their statutory power to initiate liquidation.

6.5.6.2 Process

Under the statutory management process, the Crown appoints a manager. The appointment brings the corporation under the control of the Crown-appointed manager. There is no fixed time period for the statutory management. The statutory management of a corporation will result in each of the subsidiaries of the corporation being deemed to be subject to statutory management, unless the Governor-General declares otherwise.[401]

The statutory management process commences by way of a declaration by the Governor-General by Order in Council. This is done on the advice of the Minister of Commerce pursuant to a recommendation of the Financial Markets Authority (FMA).[402]

6.5.6.3 Grounds

The Corporations IM Act governs the statutory management of a "corporation" which is defined widely to be a "body of persons, whether incorporated or not, and whether incorporated or established in New Zealand or elsewhere".

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397 Corporations (Investigation and Management) Act 1989, Pts 3 and 4.
398 Part 5 of the Reserve Bank of New Zealand Act 1989.
399 Subpart 4 of Part 4 of the Insurance (Prudential Supervision) Act 2010.
400 *Ararimu Farms and Investments Ltd v Stotter* [1993] MCLR 1 CA and *Crawford v Pardington* [2012] NZHC at 41.
401 Corporations (Investigation and Management) Act 1989, s 38.
402 The Financial Markets Authority is the New Zealand government agency responsible for enforcing securities, financial reporting and company law as they apply to financial services and securities markets. It also regulates securities exchanges, financial advisers and brokers, auditors, trustees and issuers - including issuers of KiwiSaver and superannuation schemes. The FMA jointly oversee designated settlement systems in New Zealand, with the Reserve Bank of New Zealand (RBNZ).

The FMA may only appoint if the specified grounds are made out. Section 4 of the Corporations IM Act provides that this includes where a corporation is operating fraudulently, or in a reckless manner.[403]

6.5.6.4 Consequences of appointment

On appointment, the manager takes control of the management of the corporation and utilises his or her powers to determine the fate of the corporation. Directors and officers are not able to continue the conduct or management of the business, unless the permission of the manager is given.[404] Creditors and members or shareholders of the entity have no right to be consulted as to the fate of the entity.

Like VA, the appointment results in a moratorium on creditors' claims, both secured and unsecured. The moratorium is intended to preserve and protect the interests of beneficiaries of the assets and the public interest, while the statutory manager decides the fate of the entity.

The moratorium is not absolute and a statutory manager may waive the application of the moratorium to claims by a secured creditor or claims by a creditor or class of creditors.[405] The moratorium also does not result in the cancellation or determination of rights or claims. Specific rules also apply in the case of netting agreements to which sections 310A to 310O of the Companies Act, or sections 225 to 263 of the Insolvency Act, apply.

Generally, all enforcement action by creditors (whether through proceedings or otherwise) are stayed. Action cannot be taken without the manager's consent or the Court's permission. This prohibition does not affect post-appointment contracts or obligations. Rights of set-off cannot be exercised. The commencement of statutory management suspends any prior winding up, liquidation or receivership while the manager is appointed. These processes will be revived on the termination of the statutory management, unless the Order in Council specifies otherwise.

A statutory management can terminate in two ways. The first is where the Order in Council specifies an event or a date and time. The second termination event is where the statutory manager puts the corporation into liquidation.

6.5.6.5 Powers and obligations of manager

There are limited duties imposed on a statutory manager under the Corporations IM Act.

A statutory manager has a broad range of powers under the regime, though they must be exercised in accordance with and subject to the statutory objectives. The Corporations IM Act sets out express factors and matters which must be considered by the statutory manager in exercising his or her powers.[406] The manager has all powers, rights and privileges vested in the company prior to the appointment, all powers of the members in a general meeting and board of directors of a body corporate (where applicable) and in the case other than a body corporate, all the powers of the governing body. The statutory manager may carry on business,

[403] Corporations (Investigation and Management) Act 1989, ss 4 and 6.
[404] There is a limited exception that applies to a covered bond special purpose vehicle as provided for in s139J(1)to(3) of the Reserve Bank of New Zealand Act 1989.
[405] Corporations (Investigation and Management) Act 1989, s 42(3).
[406] *Idem*, s 41(1)(a) to (c).

compromise and pay creditor claims, terminate a contract or service and sell or dispose of the business of a corporation. The power to sell is granted notwithstanding security held by any other person. Where the power of sale is exercised in respect of a secured asset, the regime provides for the secured creditor to be paid in priority, after other priority claims are met (costs of the manager in selling the asset and preferential claims discussed at paragraph 6.4.5.4 above). The manager may also ask the Court to make orders to enable the tracing of property.

As in liquidations, suppliers of essential services are prevented from refusing to supply unless paid for outstanding amounts incurred pre-appointment.

A number of powers vested in the liquidator in liquidation also apply to a statutory manager, including the powers discussed at 6.4.7.2 to 6.4.7.7. The provisions and rights under section 301, and those set out at sections 310G, 310I and 312, also apply in statutory management. The manager also has the power to disclaim onerous property.

A statutory manager is indemnified by the Crown in respect of liability relating to the exercise of his or her statutory powers (including legal costs).

Power to apply to Court

Conversion to liquidation

A statutory manager may apply to the Court for a number of orders. These include orders to liquidate (on usual grounds or any other statutory ground provided in other legislation).

In addition to the above, the statutory manager may also, if the above does not apply, make a recommendation to the relevant Minister for the winding up of the corporation. The Governor-General may act on this recommendation and direct winding up by Order in Council.

Other court applications

The statutory manager is also conferred powers to seek directions from the Court on the business or property of the corporation and its administration or management. If orders are made, all persons will be bound by the Court order. The statutory manager many also seek additional powers, where required, but these will only be granted if congruent with the policy and objectives of the Corporations IM Act.

Self-Assessment Exercise 5

Question 1

What are the main corporate rescue mechanisms in New Zealand?

Question 2
Is insolvency a prerequisite for entry into the corporate rescue regimes?

Question 3

What are the gateways for a company to enter into voluntary administration? What are the key benefits?

Question 4

How does statutory management differ from other corporate rescue regimes?

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

6.6 Receivership

6.6.1 Introduction

Receivership plays an important role in the New Zealand business environment. The receivership is usually in respect of secured property; however, it is possible to appoint a receiver over a person, though this is rare. This section focuses on receivership in the corporate context.

The appointment of a receiver takes the management and control of the property subject to receivership out of the hands of the grantor of the security and puts it in the control of the receiver. The directors of a company remain in office following appointment. Their powers in relation to its assets are restricted, but not at an end. In all other respects, the debtor company remains intact. The debtor in receivership retains ownership and possession of the security property.

The private appointment of a receiver does not result in a collective insolvency procedure (as is the case following the appointment of a liquidator or administrator). All other creditors (secured and unsecured) are entitled to continue individual action against the debtor. Where the secured creditor has security over all of the company's assets, there is often very little incentive for a unsecured creditor or subordinated security holder, to take action, as the realisation of available assets are usually applied, subject to limited exceptions, to secured claims, in accordance with their statutory priority as determined by both the PPSA and Receiverships Act.

6.6.2 Appointment

There are two mechanisms by which a receiver may be appointed.

The first (and least common) is by appointment by the High Court, either pursuant to a specific power conferred by statute, or in the exercise of its inherent jurisdiction.[407] A party seeking the appointment of the receiver must apply to the High Court for such an order. The Court is generally reluctant to exercise its discretion to appoint a receiver unless the right to appoint is conferred by statute, or the applicant has no other remedy and other grounds exist that justify the appointment (for example, there is a need to preserve property / value of property pending litigation or to facilitate an

[407] *Rea v Omana Ranch Ltd* [2012] NZHC 2639, [2013] 1 NZLR 587 at [7]–[9]

execution process).[408] The appointment will usually have a specific purpose, and the receiver's powers will be granted as necessary to meet this purpose. Appointment is not dependent on insolvency.

A court-appointed receiver is subject to the supervisory jurisdiction of the Court. The receiver is independent of all parties and is not answerable to the debtor party or creditors (unless ordered otherwise by the Court). A court-appointed receiver is required to act impartially and in accordance with the Court's directions.

The vast majority of receiverships in New Zealand arise through private appointment by a secured creditor exercising its contractual right under a security agreement.[409] Court approval is not required for such an appointment, though the appointer must ensure that the appointment occurs in writing and all requisite conditions under the contractual terms have been met.

Any party not disqualified from acting under section 5 of the Receiverships Act may currently be appointed. Section 5 is primarily directed at those who are likely to lack the necessary competence and / or skills to perform the role and those who are likely to experience a conflict of interest in the role. Under the new IPRA regime, only those who are licensed and are entitled to act as a receiver in accordance with the IPRA and are otherwise not disqualified under the new substituted section 5(2)(2) of the Receiverships Act, may act. Those disqualified under the new regime include the mortgagee of the property in receivership, directors (whether of the grantor company or related entity), parties with a direct interest in the shares issued by the debtor company, related parties and those who have previously acted as a liquidator or administrator of the company. The prohibition is not absolute as the Court may grant permission to a disqualified party to act. Individuals who take appointments in contravention of section 5 of the Receiverships Act commit an office.

6.6.3 The role of the receiver

The principal role of a privately appointed receiver is to bring about repayment of the debt secured by the security agreement.

In doing so, a receiver is required to act in good faith for proper purpose[410] and in a manner that he or she believes on reasonable grounds to be in the best interest of the person in whose interest he or she has been appointed. The receiver is required to have reasonable regard to the interests of the grantor, parties claiming interests in the property through the grantor, unsecured creditors and sureties of the grantor's obligations, but only to the extent consistent with the obligation to act in the interests of the appointing party.[411]

Unless the security agreement provides to the contrary, a privately appointed receiver acts as agent of the grantor company. Despite the receiver holding the position of agent of the company, the relationship is not an ordinary agency relationship because of the overlaying duties owed by a receiver to various parties, including the appointing party, the grantor and various stakeholders.

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408 *Idem*, at [10].
409 Receiverships Act 1993, s 6(1).
410 *Idem*, s 18.
411 *Idem*, s 18(3).

6.6.4 Powers and duties of a receiver

6.6.4.1 Powers of a receiver

A receiver's powers are governed and conferred by the contractual terms under which he or she was appointed and the Receiverships Act.[412] There is no express provision in the Receiverships Act that gives the receiver a power to sell. In almost all cases, the power will include an entitlement to manage income and to sell assets for the purpose of satisfaction of the secured debt.

Receivers do not have an express power to disclaim contracts; however, a receiver has a statutory ability to terminate employment contracts within 14 days of his or her appointment, failing which personal liability will attract.[413] A receiver will also become liable for rent accrued in the period 14 days after the date of appointment, up until the date the receivership ends, or the date on which the grantor ceases to use the property, whichever is the earlier.

A receiver is otherwise personally liable for contracts entered into by the receiver in the exercise of his powers and remuneration under any contract with a director (or the equivalent of a director in an entity that is not a body corporate) where the receiver has affirmed the contract.

The Court may also exempt a receiver from personal liability in certain circumstances.[414]

6.6.4.2 Duties of a receiver

The duties of a receiver are prescribed by the Receiverships Act and the terms agreed in the security agreement.[415] The prescribed statutory duties include duties to have regard to the interests of certain parties on the exercise of various powers, including the power of sale. A receiver that fails to comply with his or her duties may be the subject of an application brought in the High Court for breach of duty. This may result in the Court removing the receiver or making other orders as appropriate.

Receivers are otherwise subject to the Court's supervision and have powers to seek directions on the extent of powers, rights or obligations relating to the receivership.

6.7 Informal restructuring

There is limited data in New Zealand on the use of informal restructuring. Informal restructuring is not often used because creditors who are secured will elect to enforce their rights as it is relatively easy for this to occur.

Unlike other jurisdictions, New Zealand also has an extremely large number of SMEs. As noted in the discussion about voluntary administration (VA), the size of these businesses makes restructuring a less viable option due to the fact that, amongst other things, it is cost prohibitive.

As noted above, New Zealand has introduced business debt hibernation (BDH) as a form of compromise. While not a formal restructuring option, it is possible that BDH

412 *Idem*, s 14(1).
413 *Idem*, s 32(1).
414 *Idem*, ss 32(7) and 33.
415 *Idem*, ss 18, 19, 22, 23, 24, 28 and 30A.

may be used as an alternative to VA, given the BDH regime has some similarities in terms of the moratorium. To date, BDH proposals have remained low and the uptake has been slow.[416] The new safe-harbour provisions may also incentivise some directors to consider restructuring as an alternative to liquidation.

It remains to be seen whether these new provisions will increase incidents of informal restructuring in New Zealand.

7. CROSS-BORDER INSOLVENCY LAW

7.1 Introduction

In general terms, insolvent estates are administered and governed pursuant to the law of the jurisdiction in which the insolvent has assets and / or liabilities.

The rules governing recognition of foreign collective insolvency processes and judicial decision-making in cross-border insolvency matters is based on concepts of comity and "modified universalism". As set out *Re HIH Casualty and General Insurance Ltd*:[417]

> "That principle requires that English courts should, so far as is consistent with justice and UK public policy, cooperate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

Where the insolvent has assets or liabilities in another jurisdiction (or where assets are located in New Zealand), administration of the assets and liabilities of the insolvent occurs in New Zealand through:

- where applicable, assistance and recognition under the UNCITRAL Model; or
- the recognition and assistance of the foreign state, pursuant to the rules of private international law.

Accordingly, insolvency practitioners and creditors who are seeking recognition and assistance in New Zealand, can obtain recognition and assistance under the UNCITRAL Model Law as enacted in New Zealand by the Insolvency (Cross-border) Act 2006. If the Insolvency (Cross-border) Act does not apply, a party may seek assistance from the High Court.

7.2 New Zealand position – cross-border insolvency

Assistance available in New Zealand to a foreign insolvency administrator is comprised of:

- recognition and assistance provided at common law;
- assistance previously provided under section 135 of the Insolvency Act 1967 in respect of bankrupt individuals;

[416] https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12349592.
[417] [2008] UKHL21, [2008] 1 WLR 852 at 20.

- liquidation of assets of an overseas company pursuant to section 342 of the Companies Act.

7.2.1 Common law

The common law position in New Zealand was premised on established English principles of private international law.

Under this process, the Court would recognise the appointment and authority of a foreign insolvency administrator appointed to a debtor in the place of that debtor's domicile, in the case of an individual, or incorporation, in the case of an overseas company. Recognition would follow as a matter of course unless the foreign proceeding under which the foreign administrator was appointed was not final, was contrary to public policy or breached the rules of natural justice. The recognition granted was subject to any positive law in New Zealand.[418]

Once a recognition order was made, the New Zealand courts were required at common law to provide assistance to the foreign proceeding. The nature of the assistance would be governed by New Zealand insolvency law and would be decided at the discretion of the Court. Assistance could include, for example, the staying of proceedings in New Zealand, or orders enabling a foreign administrator to dispose of assets for distribution in accordance with the laws of the foreign jurisdiction.

However, the assistance of the Courts can have its limits. Assistance provided at common law in respect of foreign insolvency proceedings could be dependent on whether creditors in New Zealand were adequately protected under the insolvency law of the foreign jurisdiction which the Court was asked to assist with. Other factors that justified the Court ordering ancillary New Zealand insolvency proceedings include where specific statutory powers were required (for example, powers of examination), or where rights of action vested in the liquidator by statute (for example, recovery of voidable / preference claims).

7.2.2 Statutory assistance

Statutory assistance was also available to foreign insolvency administrators under:

- section 135 of the Insolvency Act 1967 (predecessor to the Insolvency Act 2006) in respect of bankrupt individuals; and

- section 342 of the Companies Act 1993 in relation to assets of an overseas company.

Section 135 operated in respect of individuals subject to bankruptcy proceedings in another jurisdiction.

Under the Insolvency Act 1967, the High Court had an obligation to assist a foreign Court of any Commonwealth country having jurisdiction in bankruptcy on request.[419]

The request for assistance would allow the Court in New Zealand to exercise any discretion or power it had in relation to the specified order that it could exercise if the

[418] *Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme"* [1997] 2 NZLR 110 (HC).
[419] Section 135(1), Insolvency Act, s 135(1).

matter had arisen in New Zealand. If the request was made by a Court that was not from a Commonwealth country, the power to assist was discretionary.

In relation to corporate entities in liquidation, there was no equivalent to section 135. The Companies Act instead permitted an application to the High Court for the liquidation of the assets of an overseas company. The liquidation order where the overseas company was already subject to winding up proceedings in its place of incorporation, operated as an ancillary order to the liquidation.

7.2.3 Legislative reform

In 1997, the Law Commission in New Zealand undertook a review on the subject of international trade. A Report was issued by the Law Commission in 1999 which raised the question of whether New Zealand should adopt the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI).[420]

The Law Commission concluded that, on balance, despite there being factors weighing against adoption of the MLCBI, there were more factors in favour of it. In December 2015, the Insolvency Law Reform Bill (Bill) introduced the cross-border regime by adoption of the MLCBI. As set out in the Bill, the intention was that this would facilitate the initiation of cross-border insolvency proceedings that were efficient, effective and equitable to all parties involved.

The Bill separated the proposed cross border amendments which were introduced through the Insolvency (Cross-border) Bill. The MLCBI was adopted in New Zealand by the Insolvency (Cross-border) Act 2006 (Cross-border Act). The Act came into force on 24 July 2008.

7.2.4 Insolvency (Cross-border) Act 2006

Despite the relatively small number of states adopting the MLCBI,[421] the implementation of the UNICTRAL Model by Australia, Singapore, South Korea, Japan, Chile, Mexico, Canada, the United Kingdom and the United States is of enormous advantage to New Zealand. These parties are all states with whom New Zealand have particular trade relationships, including free trade agreements.[422] The mutual co-operation by New Zealand with these countries to deal with cross-border insolvency issues ensures a streamlined and efficient process with key strategic partners. This assists affected parties with minimising loss and allows for parties to trade across borders with a degree of confidence.

The principal role of the Cross-border Act has been to implement a modified form of the UNCITRAL Model law. In addition, the Cross-border Act provides for the liquidation in New Zealand of an overseas company, extends the power of the High Court to aid in all insolvency proceedings, not just personal insolvency proceedings,[423] and regulations to designate particular insolvency proceedings as a

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420 Law Commission Report 52: *Cross-border Insolvency – Should New Zealand adopt the UNCITRAL Model Law on Cross-border Insolvency?*, 18 February 1999, Wellington, New Zealand. https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R52.pdf.

421 https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.

422 *The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (New Zealand, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, and Viet Nam; New Zealand Singapore Closer Economic Partnership; Trans-Pacific Strategic Economic Partnership (P4); New Zealand Australia Closer Economic Relations (CER)*.

423 Insolvency (Cross-border) Act, s 8.

specified insolvency proceeding, enabling customisation of the UNCITRAL Model law in relation to particular proceedings in particular states.[424]

In adopting the Cross-border Act, New Zealand has made a number of decisions which result in a deviation from the UNCITRAL Model law, including:

- the exclusion of registered banks (as defined under the Reserve Bank of New Zealand Act 1989). Unlike Australia, New Zealand has not excluded insurers;
- the New Zealand regime prohibits the taking of action which conflicts with the obligation of New Zealand arising out of any treaty or other form of agreement to which New Zealand is a party with one or more states;[425]
- like other states, the Court may refuse to take action if the action would be manifestly contrary to the public policy of New Zealand. However, before the Court declines to take action, the Court must consider whether the Solicitor-General should be heard on the question of public policy;[426]
- the Cross-border Act has express provision to matters which may be referenced to assist with interpretation;[427]
- New Zealand's legislative regime includes a requirement that once recognition orders are made, or where interim relief is granted, that notice is given to the debtor. There is no equivalent to this in the legislative regime in the United Kingdom, Australia or the United States. The Court may terminate this relief on the appointment of a statutory manager under the Reserve Bank of New Zealand Act 1989;
- like other jurisdictions such as the United Kingdom and Australia, once a recognition order is made there is an automatic stay of claims and proceedings. The New Zealand regime, however, appears to impose a much broader stay than that which would otherwise apply in liquidation or bankruptcy.[428] An affected creditor or interested party can however seek orders from the Court to limit the operation of the stay.

Under the Cross-border Act, the New Zealand High Court has exclusive jurisdiction on matters relating to the recognition of foreign proceedings and other matters concerning cooperation with foreign courts.

7.2.5 Case law

The Cross-border Act has been considered in the New Zealand Court, though the occasions it has done so have been limited since 24 July 2008, when the Cross-border Act came into force. Three cases outlining the above principles are discussed below.

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424 *Idem*, s 10.
425 *Idem*, Sch 1, art 3.
426 *Idem*, Sch 1, art 6.
427 *Idem*, s 5.
428 *Idem*, Sch 1, art 20(1).

Williams v Simpson[429]

Williams v Simpson is the main case in New Zealand on the assessment of "centre of main interests" (COMI) under the cross-border regime. The Court noted that the assessment was fact specific, but with specific reference to Article 16 of Schedule 1, which had a starting assumption that the presumption of COMI was the person's place of habitual residence.[430]

Mr Simpson had been adjudged bankrupt in England. He was a retired psychiatrist who had practised in London, but had lived in New Zealand for many years and regarded New Zealand as his home, although he spent part of each year in England. It was alleged that Mr Williams owed GBP 242,920.29 to the petitioning creditor, Society of Lloyd's.

The trustee appointed by the English Court believed that Mr Simpson had property in New Zealand and applied for an order under the Cross-border Act recognising the English bankruptcy as a foreign main proceeding or foreign main proceeding. Alternatively, the trustee applied for an order of assistance under section 8 of the Cross-border Act. Under interim search-and-seizure orders made by the Court, certain property (including gold bullion, foreign currency, computer data and documents) had been found at Mr Simpson's residence and seized.

The Court determined that for recognition of the English bankruptcy as a foreign main proceeding to occur, it had to be shown that England was the place where the debtor had the centre of his main interests. The presumption that an individual debtor's habitual residence was the centre of his or her main interests applied, with the result that it was New Zealand. The English bankruptcy did not qualify as a foreign non-main proceeding since the evidence did not show that, as at the relevant date, the debtor had had an establishment in England where he was carrying out a non-transitory economic activity. The definition of "establishment" in Schedule 1 to the Cross-border Act expressed in the present tense, meant that it was insufficient to show the debtor had past involvement of trade in the foreign jurisdiction. The Court found, however, that it had jurisdiction to order relief under Article 8 of Schedule 1 to provide assistance to the English Court by enabling the trustee to realise assets in New Zealand.

Whittman v UCI Holdings Ltd[431]

Whittman v UCI Holdings Ltd concerned an application for recognition of a USA bankruptcy proceeding under Chapter 11 of the US Bankruptcy Code. UCI Group conducted business primarily in the United States; however, the parent company was incorporated and domiciled in New Zealand.[432]

The parent company and the group of companies in the US filed for Chapter 11 in the United States. Mr Whittman, as the foreign representative, sought recognition of the Chapter 11 proceeding in New Zealand as a foreign main proceeding. The foreign representative also sought orders to give effect to the automatic stay under the Bankruptcy Code, in New Zealand.

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429 [2011] 3 NZLR 380.
430 See Insolvency (Cross-border) Act 2006, Sch 1, art 16(3).
431 [2016] NZHC 1754.
432 The court noted that this may have arisen due to four of the six directors residing in New Zealand.

Although the creditors did not oppose the orders, one creditor sought a condition that UCI Holdings comply with orders of the Bankruptcy Court in Delaware. The Court refused to grant the order on the basis that it did not see a proper basis for supervision of the company's conduct in the foreign Court.

After granting the order for recognition on the basis that UCI's COMI was in the US, and the Chapter 11 proceeding qualified as a foreign main proceeding, the Court moved on to consider whether there was a proper basis for modifying the stay. The foreign representative sought to modify the stay so that the terms of the stay were consistent with that imposed by US law. The Court accepted the argument that it would be inefficient to have two different sets of rules applying and that considerations of comity and practicality necessitated modification of the stay terms under Article 21 of Schedule 1 so they were consistent with those in the United States.[433]

Kim v STX Pan Ocean Co Ltd[434]

In *Kim v STX Pan Ocean Co Ltd*, the Court considered for the first time the interface between the Cross-border Act and claims in admiralty. This judgment is of significance as it demonstrates the Courts in New Zealand will not exercise a discretion in a manner that will deprive a secured creditor from their substantive rights or interests.

The claimants in this case were secured creditors who sought the Court's permission to continue claims *in rem* against the ship, New Giant, under the Admiralty Act 1973.

A key issue was whether the vessel under demise charter was an asset of STX so that the automatic stay applied. If so, the question was whether the claim *in rem* could continue, despite the stay provisions under Article 20 of Schedule 1.

The administrators were appointed by the Korean Court, on the application of STX. At the same time, the Court granted interim relief by way of a moratorium which prevented STX from paying or securing liabilities or dealings with its assets and other creditors from exercising recovery rights. Proceedings were filed in admiralty. The New Giant was arrested in New Zealand.

The administrators sought to be recognised in New Zealand under the Cross-border Act. This application was granted by the Court. The claimants filed for leave to continue the statutory claim *in rem*.

The Court noted that the automatic stay under Article 20(1) of Schedule 1 applied to the proceedings *in rem.* After assessing Article 20(2) of Schedule 1, the Court noted that Parliament had considered it appropriate to confer a broad discretion on the Court to grant leave in appropriate situations so that creditors could seek the same protections they would otherwise have under their own domestic laws.[435]

The Court further explained that in considering whether its discretion should be exercised, it would need be satisfied that the commencement of proceedings would not confer an advantage to one creditor over others.

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433 *Whitmann v UCI Holdings Ltd* [2016] NZHC 1754, at [24]-[25].
434 [2014] NZHC 845.
435 At para [23] of the judgment.

The Court noted that, in this case, the claimants had a security interest over the New Giant upon using the admiralty proceeding. Any right of sale would have been subject to the security interest in the vessel.[436] The Court did not accept the argument by the administrators that the proceedings were caught by the moratorium by the Korean courts because the proceedings were issued after the interim court order. The Court took the position that the interim orders did not prevent the filing of proceedings and it was the act of filing that conferred the security interest. The interim order did not have the effect of restricting creditors with maritime liens or statutory rights *in rem* from exercising those rights.[437]

Self-Assessment Exercise 6

Question 1

What are the strategic advantages of New Zealand implementing the UNCITRAL Model Law on Cross-Border Insolvency?

Question 2

Name two areas where the New Zealand Insolvency (Cross-border) Act diverges from the standard UNCITRAL Model Law on Cross-Border Insolvency terms.

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

8. RECOGNITION OF FOREIGN JUDGMENTS

8.1 Enforcement of foreign judgments in New Zealand generally

The cross-border enforcement of judgments is a reality for many businesses across the globe. Judgments obtained outside New Zealand do not have direct force in New Zealand. However, judgments obtained in another jurisdiction are generally enforceable in New Zealand. There are four methods of enforcing foreign judgments in New Zealand. Which method is used depends on the forum in which the judgment was obtained. The four methods are:

- enforcement under the Reciprocal Enforcement of Judgments Act 1934;
- enforcement under the Enforcement of Commonwealth Judgments Under Senior Courts Act 2016;
- enforcement under the Trans-Tasman Proceedings Act 2010; and
- enforcement under common law.

In addition, New Zealand is also a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York

[436] At para [29] of the judgment.
[437] At para [39] of the judgment.

Convention) which allows for the enforcement of arbitral awards through a simple registration process where the arbitral award has been obtained from another signatory state. As at March 2020, there were 163 signatories to the New York Convention.[438]

On 2 July 2018, the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018) was passed.[439] This was designed to enable cross border recognition of foreign insolvency proceedings. This is yet to be adopted by a country.

In similar vein, the United Nations Commission on International Trade Law (UNCITRAL) and the Hague Conference on Private International Law (the HCCH) has been undertaking work to find a solution which would allow for judgments to be registered in the same manner, rather than through an *ad hoc* system dependent on nation state rules.

The aim was to create a system of recognition of decisions based on court cases where the court was chosen pursuant to a choice of court agreements, which would create the same level of predictability and enforceability as is the case in arbitral awards in New York Convention states.

In 2019, the HCCH concluded the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention).[440] The Judgments Convention will regulate the enforcement of foreign judgments by state parties. It has a specified scope which includes insolvency matters. There must be a minimum level of contact between the issuing state and the defendant (which can include habitual residence, submission to jurisdiction and connections arising from the relationship of the subject matter and the judgment and the state of origin). Registration can also be contested.

8.2 Reciprocal Enforcement of Judgments Act 1934

The Reciprocal Enforcement of Judgments Act 1934 provides a statutory regime that allows for judgments from other countries who have agreed to grant reciprocal rights, to be registered and enforced in New Zealand. In general terms, only those judgments from the Higher Courts in other jurisdictions can be registered using this process.

The enforcement process under the Reciprocal Enforcement of Judgments Act is summary in nature and requires the judgment creditor to file the foreign judgment (translated into English if necessary) with evidence of, amongst other things, the relevant interest rate, judgment debt and right to enforce. Once issued by the Court, the order must be served on the judgment debtor, who may contest registration. The grounds for contesting registration is set out in the Act and includes:

- the judgment is not properly registrable in New Zealand;
- lack of jurisdiction of the original Court;

[438] https://en.wikipedia.org/wiki/Convention_on_the_Recognition_and_Enforcement_of_Foreign_Arbitral_Awards#Parties_to_the_Convention – 34 UN member states have not yet adopted the New York Convention.
[439] https://uncitral.un.org/en/texts/insolvency/modellaw/mlij.
[440] At present, two states have adopted the Judgments Convention, Ukraine and Uruguay. New Zealand is not yet a signatory. It is anticipated, however, that the Judgments Convention will receive increased attention over the coming years.

- failure to give sufficient notice of the proceedings in the original Court to enable the judgment debtor to defend the claim;
- the judgment was obtained by fraud;
- the registration is contrary to public policy in New Zealand;
- rights under the judgment are not vested in the applicant.

8.3 Senior Courts Act 2016

The Senior Courts Act 2016 (SCA) provides for the enforcement in the High Court of a monetary judgment of any Commonwealth Court.[441] This can only be relied on to the extent a judgment cannot be registered under the Reciprocal Enforcement of Judgments Act.

The process under the SCA allows a judgment creditor to file a memorial of the overseas judgment or order obtained. The SCA regime is a self-contained regime and excludes the operation of the Court's inherent jurisdiction. If a judgment is enforced under this process, the Court will not re-examine the merits of the foreign judgment.

The memorial filed with the Court must contain specific details, including essential facts such as the details of the parties, the date of trial and entry of judgment. Once filed, the memorial is treated as a record of the Court and execution can occur in accordance with the rules set out in the SCA. The judgment debtor is ordinarily notified by way of a summons and is provided with the opportunity to set out the reasons why execution should not occur on the judgment.

If the judgment debtor does not successfully apply for the judgment not to be enforced in New Zealand, the High Court may make an order allowing execution on such terms and conditions as it thinks fit. Costs can be ordered in respect of the application made under the SCA. The costs order can be enforced as an order of the New Zealand Court. Interest cannot be ordered on the foreign judgment.[442]

8.4 Trans-Tasman Proceedings Act 2010

The Trans-Tasman Proceedings Act 2010 (TTPA) came into force in 2013. The legislation introduced a regime to streamline the processes for managing and resolving civil and criminal proceedings between New Zealand and Australia, recognising the close economic ties between the two jurisdictions.

Under the TTPA, a wider variety of judgments obtained in Australia are registerable and enforceable in New Zealand as thought the order was one made by the New Zealand Court. The TTPA allows for the registration of monetary judgments and other judgments including specific performance orders, interlocutory and injunction orders. However certain types of judgments are not enforceable using this process, including judgments in respect of wills, care of minors or incapacitated persons, child support orders and certain cross-border insolvency orders.

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441 Senior Courts Act 2016, s 172.
442 *Michael Wilson & Partners Ltd v Sinclair* [2016] NZCA.

To be eligible for registration in New Zealand, the Australian judgment must be:

- given in a civil proceeding by an Australian court or prescribed tribunal;
- given in a criminal proceeding by an Australian court in respect of compensation, damages, or reparation payable to an injured party;
- for the payment of expenses incurred by a witness in complying with an Australian subpoena served on the witness in New Zealand, or incurred by a person in connection with the taking of remote evidence;
- registered in an Australian court under the Foreign Judgments Act 1991 (Aust);
- be enforceable in Australia.

The application must be served within a prescribed timeframe.[443] The judgment is effective from the date of registration if notice is given, or 45 working days after the date of registration, if no notice is given.

The judgment debtor or other party can contest registration on specified grounds. These include that the registration process is defective or failed to comply with the TTPA, enforcement is contrary to public policy in New Zealand, or the judgment was given in a proceeding the subject matter of which was immovable property, or was given in a proceeding *in rem* the subject matter of which was movable property and that property was, at the time of the proceeding in the original court or tribunal, not situated in Australia. Once registration is complete and is effective, the entitled party may proceed with enforcing the judgment.

8.5 Common law enforcement

Foreign judgments in New Zealand may be enforced at common law by action.

Assuming the judgment of the foreign court is final, the usual course is to enforce by issuing summary proceedings in New Zealand to obtain judgment in New Zealand.

To be enforceable under the common law rules, the judgment must be for a monetary sum and final and conclusive in the foreign jurisdiction. A judgment is not final or conclusive if the foreign Court can vary the order in the future. A judgment debtor may contest enforcement of a foreign judgment in New Zealand on grounds that:

- there was a fraud by either the judgment creditor or the Court issuing judgment in the foreign jurisdiction;
- lack of jurisdiction (in the view of the New Zealand court) by the foreign court;
- enforcement contravenes public policy;
- breach of natural justice in the proceedings in which the foreign judgment was issued.

[443] 15 working days

As a general rule, a court of a foreign country is regarded as having jurisdiction to give a judgment capable of enforcement or recognition in New Zealand in any of the following cases:

- if the judgment debtor was, at the time the proceedings were instituted, resident in the foreign country. In the case of a business or company, the debtor must have had a place of business in the foreign jurisdiction;
- if the judgment debtor was the plaintiff, or had counter-claimed, in the proceedings in the foreign country;
- if the judgment debtor submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings;
- if the judgment debtor had, prior to the commencement of proceedings, agreed to submit to the jurisdiction of the foreign court in respect of the subject matter.

The Court in New Zealand will not, as a general principal, re-visit the merits of a final judgment on errors of fact or law. Nor can a complaint be raised that the foreign Court was not competent to grant the order under the law of the foreign jurisdiction.

Self-Assessment Exercise 7

Question 1

Name the key ways an overseas judgment can be enforced in New Zealand.

Question 2

Will the Court recognise a foreign judgment for an insolvency proceeding in New Zealand?

For commentary and feedback on self-assessment exercise 7, please see APPENDIX A

9. INSOLVENCY LAW REFORM

9.1 Reform

A number of legislative changes have introduced to address the recommendations by the IWG in its two reports.[444]

As set out at paragraph 4.3.4.2, legislation has been introduced to regulate insolvency practitioners and a licensing regime has been in full force since June 2021. This addresses the concerns and recommendations of the IWG in its first report issued in July 2016.

[444] *Report No 1 of the Insolvency Working Group, on insolvency practitioner regulation and voluntary liquidations* and *Report No 2 of the Insolvency Working Group, on voidable transactions, Ponzi schemes and other corporate insolvency matters*, both available at https://www.mbie.govt.nz/business-and-employment/business/regulating-entities/insolvency-review-working-group/.

In late 2019, the second report of the IWG and its recommendations was considered by Cabinet. A number of changes were recommended and were to be addressed in a bill in 2020.[445]

As noted above, the key changes included proposed amendments to the relation-back period to reduce the time period from two years to six months for voidable transactions, amending the relation-back period in administration, providing a defence for secured creditors to a voidable charge claim and making provision for recoveries arising from a liquidator's action against directors for breach of duty to be available to unsecured creditors (and not secured). These changes have been discussed above in the various sections. Some of the changes from the COVID 19 Act can be summarised as follows:

- the introduction of business debt hibernation (BDH);
- the introduction of safe-harbour measures for directors of companies;
- reducing the suspect period for voidable transactions (other than with related parties) from two years to six months;
- increased time allowances for mortgagees and lessees in default under the PLA;
- delay to the introduction of the regulation of insolvency practitioners.

While some of the amendments were delayed from commencing, it is likely that Parliament will be reviewing this as the pandemic continues.

Other amendments that have been delayed (and which were the subject of review) include changes to the voucher regime (requiring an insolvent business to honour 50% of the value of issued gift cards of vouchers) and rules governing recoveries from reckless trading claims.

10. USEFUL INFORMATION

10.1 General information

- https://www.business.govt.nz/tax-and-accounting/closing-down/insolvency-and-involuntary-closure/;
- https://www.insolvency.govt.nz/.

10.2 For court judgments

- https://www.courtsofnz.govt.nz/judgments;
- https://www.courtsofnz.govt.nz/about-the-judiciary/structure-of-the-court-system/.

10.3 Legislation

- http://www.legislation.govt.nz/act/public/2006/0057/latest/DLM389627.html.

[445] https://www.mbie.govt.nz/assets/insolvency-law-reform.pdf.

10.4 Historical information on cross-border reform

- https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL7691_1/insolvency-cross-border-bill.

10.5 For materials on insolvency law reform

- https://www.mbie.govt.nz/business-and-employment/business/regulating-entities/insolvency-review-working-group/.

APPENDIX A: FEEDBACK AND COMMENTARY ON SELF-ASSESSMENT EXERCISES

Commentary and Feedback on Self-assessment Exercise 1

Question 1

For each of personal and corporate insolvency, what is the main governing legislation for personal insolvency?

Insolvency Act 2006 (personal insolvency) and Companies Act 1993 (corporate insolvency)

Question 2

In which court may insolvency proceedings be brought?

The High Court of New Zealand has jurisdiction over both personal and corporate insolvency matters. It retains jurisdiction in respect of insolvency matters.

Question 3

For each of personal and corporate insolvency - how is it administered and is there a regulatory body?

Personal insolvencies are administered by the OA's office (government appointment).
Corporate insolvencies are generally administered by the private appointment of third parties. Once the new legislative regime comes into force, these third parties will be subject to the new regulatory regime under the IPRA. The regime provides for co-regulation. The Registrar of Companies is empowered to grant accreditation to individuals or industry bodies who in turn will be responsible for licensing of individual practitioners and monitoring / regulating conduct. The Registrar of Companies has disciplinary powers under the co-regulation regime.

The Court retains a supervisory role over all appointees.

Commentary and Feedback on Self-assessment Exercise 2

Question 1

Explain the two key concepts underpinning personal property securities legislation in New Zealand?

Attachment and perfection are the two key concepts underpinning the PPSA. Attachment occurs once the security interest becomes enforceable against the debtor and third parties. Perfection refers to the act of registration of a security interest or taking possession of collateral, which gives rise to a priority claim, under the PPSA.

The registration system works on a public notification premises through a searchable register.

The rationale for the registration system is to provide a system that enables creditors to search the register and to have assurance as to the position of a debtor, so decisions can be made on lending. The priority regime acts as an incentive to creditors to register, increasing transparency (thereby lending reducing risk).

Question 2

In the event there is a failure to perfect a security interest, what is the effect of such a failure against a) third parties b) a liquidator?

Failure to register does not invalidate the security interest. As against third parties, the failure to register may result in the ceding of priority to other secured creditors who claim an interest in the same collateral. The priority rules are set out in the PPSA.

The failure to register does not affect a secured creditor's ability to enforce the security interest against a liquidator.

Commentary and Feedback on Self-Assessment Exercise 3

Question 1

What options are available to an individual in New Zealand to manage personal insolvency?

Bankruptcy, Debt Repayment Order, No Asset Procedure, proposal under the Insolvency Act (pre-bankruptcy) and compositions (post-bankruptcy).

Question 2

What are the benefits of invoking a voluntary alternative process?

Avoids restrictions of bankruptcy (travel restrictions, inability to manage a business or be a director or be self-employed). Also avoids the stigma of bankruptcy.

Question 3

What is the policy underpinning the rights of the OA to unwind insolvent transactions by the bankrupt?

Pari passu distribution is at the heart of the right of the OA's rights to recover transactions and distribute funds to unsecured creditors.

Commentary and Feedback on Self-Assessment Exercise 4

Question 1

In what ways can a company be put into liquidation in New Zealand?

A company in New Zealand may be liquidated by the Board or shareholder (both solvent and insolvent), application to the Court by specified parties (including creditors or shareholders), by creditors at the watershed meeting in voluntary administration.

Question 2

What actions are available to a liquidator to recover assets for the benefit of creditors?

Recovery actions set out in the Companies Act including insolvent transactions, insolvent charges, transactions at undervalue or for inadequate or excessive consideration, transactions with related parties, claims under the Property Law Act 2007 where a disposition of property has been carried out to defeat creditors' interests. Additionally, the liquidator retains the right to sue in the company's name in respect of causes of action which are vested in the company. This may include for example normal contractual claims, or claims for negligence or misappropriation of property or for breach of trust or duty. Additionally, a liquidator may also pursue claims for breaches of directors' duties (specifically, reckless/insolvent trading, amongst others).

Question 3

How are realised assets distributed by the liquidator to creditors?

The liquidator must distribute assets in accordance with the distribution regime set out in the Companies Act.

Secured creditors sit outside the collective process and are generally able to enforce their rights in priority to unsecured creditors. A liquidator may require the secured creditor to make an election as to its security (that is, surrender or enforce by realising).

The Companies Act otherwise contains a distribution regime that requires preferential creditors to be paid in first priority before unsecured creditors are paid. If there are insufficient assets to pay all parties, a secured creditor with security over accounts receivables or inventory will sit behind preferential payments. If there is a shortfall, claims in categories 2-5 of Schedule 7 of the Companies Act will reduce between themselves on a pro-rated basis.

Commentary and Feedback on Self-assessment Exercise 5

Question 1

What are the main corporate rescue mechanisms in New Zealand?

Voluntary administration, Part 14/15 Compromise, BDH. Statutory management is rare, but available.

Question 2

Is insolvency a prerequisite for entry into the corporate rescue regimes?

Generally, yes – a company must be unable to, or may be unable to, pay its due debts. In the case of voluntary administration, the word "insolvent" is used. The test applied is set out in the Companies Act and comprises both a balance sheet and liquidity limb.

In the case of a secured creditor, appointment can occur once the charge has become enforceable.

Question 3

What are the gateways for a company to enter into voluntary administration? What are the key benefits?

Voluntary on appointment by the board. Otherwise involuntary where appointment occurs due to appointment by liquidator, interim liquidator, secured party or the Court.

Question 4

How does statutory management differ from other corporate rescue regimes?

Not creditor instigated, process is commenced at the behest of the Crown.

Commentary and Feedback on Self-assessment Exercise 6

Question 1

What are the strategic advantages to New Zealand of implementing the UNCITRAL Model law?

The UNICTRAL Model has been implemented by a number of countries with whom New Zealand has relationships/trade arrangements with (Australia, Singapore, South Korea, Japan, Chile, Mexico, Canada, the United Kingdom and the United States). The mutual cooperation by New Zealand with these countries to deal with cross-border insolvency issues ensures a streamlined and efficient process. This assists affected parties with minimising loss, and allows for parties to trade across borders with a degree of confidence.

Question 2

Name two areas where the New Zealand Insolvency (Cross-border) diverges from the standard UNCITRAL Model law terms.

See paragraph 7.2.4.

Commentary and feedback on Self-assessment Exercise 7

Question 1

Name the key ways an overseas judgment can be enforced in New Zealand.

There are four methods of enforcing foreign judgments in New Zealand. Which method is used depends on the forum in which the judgment was obtained.
1) Reciprocal Enforcement of Judgments Act 1934 – requires reciprocity in other jurisdiction;
2) Enforcement of commonwealth judgments under Senior Courts Act 2016 – available if other commonwealth jurisdiction is not covered under Reciprocal Enforcement of Judgments Act;
3) Enforcement under the Trans-Tasman Proceedings Act 2010 – Australia only;
4) Enforcement under common law.

Question 2

Will the Court recognise a foreign judgment for an insolvency proceeding in New Zealand?

Yes, if not contrary to public policy.

INSOL International™

6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0)20 7248 3333 Fax: +44 (0)20 7248 3384

www.insol.org