

**THE APPLICATION OF THE "IPSO
FACTO" PROHIBITION IN
THE CORPORATIONS ACT
ON INSOLVENCY**

Ipso facto clauses

An ipso facto clause is a contractual provision that allows one party to a contract to terminate or modify the operation of the contract upon the occurrence of a specified insolvency related event (such as the appointment of an administrator, receiver, liquidator, or restructuring practitioner) in respect of a contractual counterparty. An example of an ipso facto clause is one that entitles a landlord to terminate a lease in the event that an administrator is appointed to the tenant.

Stay on enforcement of ipso facto rights

From 1 July 2018, a moratorium on reliance on "ipso facto" contractual clauses triggered by the counterparty becoming subject to certain specified formal corporate insolvency events came into effect. On 1 January 2021, the scope of the moratorium was further amended to encompass the new restructuring regime in Part 5.3B of the Corporations Act.¹

In summary, the ipso facto moratorium means there will be a stay on the enforcement of certain "ipso facto" contractual rights against companies the subject of any of the following insolvency regimes:

- a creditors' scheme of arrangement (including certain steps leading up to the scheme);
- a voluntary administration;
- a receivership but only where the receiver is appointed over the whole or substantially the whole of the property of the company; or
- a restructuring.²

The stay also extends to a right triggered by the counterparty's financial position if it is subject to one of the above insolvency regimes, or for a reason that is "in substance" contrary to the statutory provisions. The stay also applies to "self-executing" provisions which are triggered by such events.

However, the stay does not apply by reason of the counterparty becoming subject to the following insolvency regimes:

- a receiver or other controller appointment that is not over the whole or substantially the whole of the company's property;
- a deed of company arrangement;
- a liquidation; or
- a restructuring plan.

Where the operation of an ipso facto clause is stayed, the ability of the counterparty subject to the insolvency regime, and having the benefit of the stay, to enforce a right under a contract for new advances of money or credit is also stayed.

It is important to note that the stay is not intended to restrict a counterparty from enforcing a right (or to disapply self-executing provisions) arising for any other reason, such as a breach involving non-payment or non-performance.

¹ The relevant provisions are contained in sections 415D to 415G of the *Corporations Act 2001 (Cth)* (**Corporations Act**) in respect of creditors' schemes of arrangement, sections 434J to 434M of the Corporations Act in respect of receivership, sections 451E to 451H of the Corporations Act in respect of voluntary administration, and - since 1 January 2021 - in sections 454N to 454S of the Corporations Act in relation to restructuring (**Ipso Facto Provisions**). This document represents the law as at 31 March 2023, is summary only and is not comprehensive: the Ipso Facto Provisions, and the regulations and declarations made pursuant to them from time to time, should be read in their entirety in order to fully understand the operation of the ipso facto prohibition, and the exclusions from it, which extend beyond those summarised in this document.

² Restructuring is a process for companies with liabilities (excluding employee entitlements) of less than \$1 million, under Part 5.3B of the Corporations Act. The restructuring process was introduced by the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth)* from 1 January 2021.

Application of the stay

Subject to the exceptions set out below, the stay applies to all contracts, agreements or arrangements entered into on and from 1 July 2018.

Note that the stay does not apply to variations to or novations of contracts where the original contract was entered into prior to 1 July 2018, but only where such variation or novation is made before 1 July 2023. From 1 July 2023, these carve-outs for varied or novated contracts will cease to apply.

Exceptions to the stay

The ipso facto stay does not operate in a blanket manner, and there are various statutory exceptions to the stay including:

1. a right under a contract entered into after the relevant insolvency event;³
2. certain rights of secured creditors in an administration or a restructuring, including:
 - (a) the right to appoint a receiver over the whole or substantially the whole of the company's property during the "decision period";⁴
 - (b) the right of a secured creditor who enforced before the administration or restructuring commenced to continue the enforcement;⁵
 - (c) the right of a secured creditor to enforce against perishable property;⁶ and
 - (d) the right to give a notice under a security agreement;⁷
3. where the court lifts the stay in respect a right or rights on the application of the holders of the rights if it is appropriate in the "interests of justice";⁸
4. where the stay is lifted with the consent of - as applicable - the scheme administrator, receiver, administrator (or liquidator if the company has proceeded to liquidation), or restructuring practitioner (or any administrator, deed administrator or liquidator in place after the restructuring ends);⁹ and
5. rights arising pursuant to certain types of contracts, or particular kinds of rights specifically excluded from the stay by regulation or declaration, as detailed below under the heading *Exclusions from the ipso facto provisions in the Corporations Act*. Where a type of contract is excluded from the stay all rights under that contract are excluded from the operation of the stay. By contrast, where a certain type of right is excluded from the stay, that right is excluded irrespective of the type of contract it is contained in.

³ Section 415D(6)(a) in relation to a scheme of arrangement, section 434J(5)(a) in relation to receivership, section 451E(5)(a) in relation to administration and section 454N(5)(a) in relation to restructuring.

⁴ Section 441A(3) in relation to administration and section 454C(3) in relation to restructuring. The "decision period" is defined in section 9 of the Corporations Act as being the day ending on the thirteenth business day after the commencement of the voluntary administration or the giving of notice of the appointment of the voluntary administrator to the secured party.

⁵ Section 441B(2) in relation to administration and section 454D(2) in relation to restructuring.

⁶ Section 441C(2) in relation to administration and section 454E(2) in relation to restructuring.

⁷ Section 441E in relation to administration and section 454G in relation to restructuring.

⁸ Section 415E in relation to a scheme of arrangement, section 434K in relation to receivership, section 451F in relation to administration and section 454P in relation to restructuring.

⁹ Section 415D(8) in relation to a scheme of arrangement, section 434J(7) in relation to receivership, section 451E(7) in relation to administration and section 454N(7) in relation to restructuring.

Exclusions¹⁰ from the ipso facto provisions in the Corporations Act

A full list of the types of contracts that have been excluded for the purposes of s 451E of the Corporations Act can be found in Regulation 5.3A.50(2) of the *Corporations Regulations 2001* (Cth) (**Regulations**) - these exclusions also apply to the stay applicable in relation to creditors' schemes of arrangements, receivership and restructuring.¹¹

A full list of the types of rights that have been excluded from the stay can be found in the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (**Declaration**), as amended.

A consolidated list of excluded contracts and rights provided for in the Regulations and the Declaration are set out below.

The kinds of contracts, agreements or arrangements which are excluded¹²

Arrangements relating to laws, international obligations and public services*

- (a) an agreement (within the meaning of the **Convention** defined in section 3 of the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013*)
- (b) a contract, agreement or arrangement that is a licence, permit or approval issued by:
 - (i) the Commonwealth, a State or a Territory; or
 - (ii) an authority of the Commonwealth or of a State or a Territory; or
 - (iii) a local governing body established by or under a law of a State or Territory
- (c) a contract, agreement or arrangement relating to Australia's national security, border protection or defence capability
- (d) a contract, agreement or arrangement for the supply of goods or services to a public hospital or a public health service
- (e) a contract, agreement or arrangement for the supply of goods or services by or on behalf of a public hospital or a public health service
- (f) a contract, agreement or arrangement for the supply of essential or critical goods or services to, or the carrying out of essential or critical works for:

- (i) the Commonwealth, a State or a Territory; or
- (ii) an authority of the Commonwealth or of a State or a Territory; or
- (iii) a local governing body established by or under a law of a State or Territory; or
- (iv) the public on behalf of an entity covered by subparagraph (i), (ii) or (iii)

Note: Examples of these essential or critical goods, services or works include public transport services, public security or safety services, and works affecting essential public infrastructure¹³.

Arrangements relating to securities and financial products*

- (g) a contract, agreement or arrangement that is, or is directly connected with, a derivative
- (h) a contract, agreement or arrangement that is, or is directly connected with, a securities financing transaction
- (i) a contract, agreement or arrangement for the underwriting of an issue, or sale, of securities, financial products, bonds, promissory notes, or syndicated loans
- (j) a contract, agreement or arrangement under which a party is or may be liable to subscribe for, or to procure subscribers for, securities, financial products, bonds, promissory notes, or syndicated loans

¹⁰ This document represents the law as at 31 March 2023, and summarises the regulations and declarations made for the purposes of sections 415D, 434J, 451E and 454N of the Corporations Act in effect as at 31 March 2023. Sourced from the Federal Register of Legislation at 18 April 2023. For the latest information on Australian Government law please go to <https://www.legislation.gov.au>. Reproduced under the Creative Commons licence (<https://creativecommons.org/licenses/by/4.0/legalcode>) governing the use of federal legislation.

¹¹ See Corporations Regulations 5.1.50 (for section 415D), 5.2.50 (for section 434J) and 5.3B.12 (for section 454N).

¹² Contained in 5.3A.50(2) of the Corporations Regulations 2001 inserted with effect from 1 July 2018 by the Corporations Amendment (*Stay on Enforcing Certain Rights*) Regulations 2018.

¹³ Note that paragraph (f) of Corporations Regulation 5.3A.50(2) was amended by the Corporations Amendment (*Stay on Enforcing Certain Rights*) Regulations (No.2) 2018.

*Headings appear in the Explanatory Statement to the Regulations, but not actually in the Regulations - we have included them for clarity and convenience.

- (k) a contract, agreement or arrangement that is, or governs, securities, financial products, bonds, promissory notes, or syndicated loans
- (l) a contract, agreement or arrangement under which securities are offered, or may be offered, under a rights issue
- (m) a contract, agreement or arrangement for the sale of all or part of a business, including by way of the sale of securities or financial products
- (n) a contract, agreement or arrangement for the issue of an instrument that:
 - (i) is a security, financial product, bond, promissory note, or syndicated loan; and
 - (ii) belongs to a class of such instruments, each of which is fungible, and the first of which was issued before 1 July 2018
- (o) a contract, agreement or arrangement that is, or is directly connected with, a margin lending facility (within the meaning of Chapter 7 of the [Corporations] Act)
- (p) a contract, agreement or arrangement that is:
 - (i) a covered bond (within the meaning of the *Banking Act 1959*); or
 - (ii) for issuing such a bond; or
 - (iii) directly connected with such a bond or the issuing of such a bond

Complex arrangements between sophisticated parties*

- (q) a contract, agreement or arrangement providing for the management of financial investments
- (r) a contract, agreement or arrangement that involves a special purpose vehicle, and that provides for securitisation or a public-private partnership
- (s) a contract, agreement or arrangement that involves a special purpose vehicle, and that provides for a project finance arrangement under which:
 - (i) a financial accommodation is to be repaid or otherwise discharged primarily from the project's cash flow; and
 - (ii) all or substantially all of the project's assets, rights and interests are to be held as security for the financial accommodation
- (t) a contract, agreement or arrangement for the keeping in escrow of:

- (i) code, or passwords, for computer software; or
- (ii) material directly associated with such code or passwords
- (u) a contract, agreement or arrangement for the commercial charter of a ship if:
 - (i) the ship is not an Australian ship (within the meaning of the *Shipping Registration Act 1981*); and
 - (ii) the charter is by an Australian national (within the meaning of that Act) for the purposes of exporting goods from Australia, or from an external Territory, to another country

Arrangements relating to debt and the ranking of creditors*

- (v) a contract, agreement or arrangement under which the priority of security interests in particular property is changed or can change
- (w) a contract, agreement or arrangement that is a flawed asset arrangement
- (x) a contract, agreement or arrangement that is, or is directly connected with, a factoring arrangement (within the meaning of the *ASIC Corporations (Factoring Arrangements) Instrument 2017/794*)

Arrangements relating to financial markets, and clearing and settlement facilities*

- (y) a contract, agreement or arrangement that is the operating rules (other than the listing rules) of a financial market;
Note: The operating rules of a licensed market (within the meaning of Chapter 7 of the [Corporations] Act) are a contract, see subsection 793B(1) of the [Corporations] Act
- (z) a contract, agreement or arrangement that is the operating rules of a clearing and settlement facility
Note: The operating rules of a licensed CS facility (within the meaning of Chapter 7 of the [Corporations] Act) are a contract, see subsection 822B(1) of the [Corporations] Act
- (za) a contract, agreement or arrangement that confers rights on the operator of a financial market, or the operator of a clearing and settlement facility, in relation to the operation of the market or facility
- (zb) a contract, agreement or arrangement of which the parties include the Reserve Bank of Australia and the operator of a clearing and settlement facility

*Headings appear in the Explanatory Statement to the Regulations, but not actually in the Regulations - we have included them for clarity and convenience.

(zc) a contract, agreement or arrangement under which participants (within the meaning of Chapter 7 of the [Corporations] Act) in a clearing and settlement facility may settle obligations on behalf of other participants (within the meaning of that Chapter) in the facility

RTGS systems and netting arrangements within the operation of the *Payment Systems and Netting Act 1998**

(zd) a legally enforceable arrangement referred to in paragraph 9(1)(b) of the *Payment Systems and Netting Act 1998* that supports an approved RTGS system (within the meaning of that Act)

Note: The arrangement includes the rules that are part of that arrangement

(ze) an approved netting arrangement (within the meaning of the *Payment Systems and Netting Act 1998*)

Note: The arrangement includes the rules that are part of that arrangement

(zf) a contract, agreement or arrangement that confers rights on:

- (i) the operator of an approved RTGS system (within the meaning of the *Payment Systems and Netting Act 1998*); or
 - (ii) the coordinator of an approved netting arrangement (within the meaning of that Act);
- in relation to the operation of that system or netting arrangement
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(zg) a contract, agreement or arrangement under which the parties to an arrangement covered by paragraph (zd) or (ze) (the *main arrangement*) may settle obligations on behalf of other parties to the main arrangement

(zh) a close-out netting contract (within the meaning of the *Payment Systems and Netting Act 1998*)

(zi) a contract, agreement or arrangement under which security is given over financial property (within the meaning of the *Payment Systems and Netting Act 1998*) in respect of eligible obligations (within the meaning of that Act) of a party to a contract covered by paragraph (zh)

(zj) a netting market (within the meaning of the *Payment Systems and Netting Act 1998*)

(zk) a market netting contract (within the meaning of the *Payment Systems and Netting Act 1998*)

(zl) a contract, agreement or arrangement under which security is given, in accordance with a market netting contract covered by paragraph (zk), in respect of obligations of a party to the market netting contract

(zm) a contract, agreement or arrangement that is an outsourcing arrangement for the purposes of *Prudential Standard CPS 231 Outsourcing* or *Prudential Standard SPS 231 Outsourcing Note 1: In 2018, Prudential Standard CPS 231 Outsourcing was set out in the Banking, Insurance and Life Insurance (prudential standard) determination No. 6 of 2016.*

Note 2: In 2018, Prudential Standard SPS 231 Outsourcing was set out in the Superannuation (prudential standard) determination No. 3 of 2012

Arrangements prescribed for a certain period of time*

(zn) a contract, agreement or arrangement entered into or renewed on or after 1 July 2018, but before 1 July 2023, as a result of either of the following:

- (i) the novation of, or the assignment of one or more rights under, a contract, agreement or arrangement entered into before 1 July 2018;
 - (ii) a variation of a contract, agreement or arrangement entered into before 1 July 2018
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(zo) a contract, agreement or arrangement entered into on or after 1 July 2018, but before 1 July 2023, for the provision of any of the following kinds of work, goods or services for a particular project:

- (i) building work (within the meaning of the *Building and Construction Industry (Improving Productivity) Act 2016*);
- (ii) work to be carried out anywhere in Australia that, if carried out in New South Wales, would be covered by paragraph 5(1)(d) or (f) of the *Building and Construction Industry Security of Payment Act 1999 (NSW)* and not be excluded by subsection 5(2) of that Act;
- (iii) goods or services to be provided anywhere in Australia that, if provided in New South Wales, would be related goods and services (within the meaning of the *Building and Construction Industry Security of Payment Act 1999 (NSW)*)

if the total payments under all contracts, agreements or arrangements for the project for work, goods or services of those kinds is at least \$1 billion

(zp) a contract, agreement or arrangement that:

- (i) is entered into to enable the satisfactory completion of a contract, agreement or

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- arrangement covered by paragraph (zo); and
- (ii) is for the provision of a kind of work, goods or services covered by that paragraph
- (zq) a contract, agreement or arrangement that is for reinsurance or retrocession.¹⁴
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The kinds of rights which are excluded¹⁵

- 5(4)(a) a right to change the basis, including by the application of a different rate, on which an amount in respect of or under any of the following is calculated:
- (i) a financing arrangement;
 - (ii) a guarantee, indemnity or security related to a financing arrangement (whether or not the guarantee, indemnity or security is limited in any way)
- where *financing arrangement* means:
- (a) any form of financial accommodation; or
 - (b) a contract, agreement or arrangement of a kind known as a finance lease, an operating lease, a bill facility, a performance bond, a guarantee, a bank guarantee, a letter of credit or a hire purchase agreement
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- 5(4)(b) a right to payment by way of indemnity (whether or not the indemnity is limited in any way) in respect of:
- (i) any liability or loss arising as a result of a person preserving or enforcing rights; or
 - (ii) any charges and expenses incurred by a person in preserving or enforcing rights
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- 5(4)(c) a termination right under a standstill or forbearance arrangement, whether or not the standstill or forbearance arrangement suspends, preserves or modifies the right under the other contract, agreement or arrangement to which it applies where *standstill or forbearance arrangement* means a contract, agreement or arrangement that suspends or restricts the enforcement of rights under another contract, agreement or arrangement
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- 5(4)(d) a right to change the priority, or order, in which amounts are to be paid, distributed or
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- received under a contract, agreement or arrangement
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- 5(4)(e) a right of set-off or a right of combination of accounts
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- 5(4)(f) a right to net balances or other amounts
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- 5(4)(g) a right to take action to enforce:
- (i) a right referred to in paragraph 5(4)(e) or (f); or
 - (ii) a right referred to in subsection 6(1), (2), (3) or (3A)¹⁶ if, on the enforcement of that right to take action, the circumstances referred to in subsection 6(4) or (5) (as applicable)¹⁷ would be satisfied;
- for the purposes of enforcing a right referred to in paragraph 5(4)(e) or (f), or in subsection 6(1), (2), (3) or (3A)¹⁸ (as applicable), whether or not an amount is due for payment, will or may become due for payment, or is unpaid;
- Note: The rights referred to in this paragraph include:*
- (a) a right to accelerate or otherwise vary a date for payment of an amount;
 - (b) a right to convert or exchange amounts denominated in different currencies; and
 - (c) a right to crystallise a security interest
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- 5(4)(h) a right to:
- (i) assign or otherwise transfer rights or obligations; or
 - (ii) novate rights or obligations
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- 5(4)(i) a right:
- (i) for property that is subject to a circulating security interest to become subject to a noncirculating security interest; or
 - (ii) for a floating charge over property to operate as a fixed charge; or
 - (iii) for property consisting of accounts or chattel paper to be transferred to a secured party by way of security; or
 - (iv) that restricts the grantor of a security interest in property from dealing with the property
- where words and expressions that are defined for the purposes of the *Personal Property Securities Act 2009* have the same meanings
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- 5(4)(j) a right:
- (i) to perform obligations; or
 - (ii) to engage another person to perform obligations; or
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¹⁴ Paragraph (zq) was inserted by *Treasury Laws Amendment (Miscellaneous and Technical Amendments) Regulations 2020* Sch 1, 8.

¹⁵ Contained in section 5(4) of the Corporations (Stay on Enforcing Certain Rights) Declaration 2018; applicable under sections 415D(7), 434J(6), 451E(6) and 454N(6) of the Corporations Act.

¹⁶ See below - these are *The kinds of rights which are excluded in specified circumstances - a right to appoint a controller*.

¹⁷ See below - these are *The kinds of rights which are excluded in specified circumstances - a right to appoint a controller*.

¹⁸ See below - these are *The kinds of rights which are excluded in specified circumstances - a right to appoint a controller*.

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- (iii) to enforce rights; or
 - (iv) to engage another person to enforce rights;
- of the specified person under a contract, agreement or arrangement where *specified person* means the body, corporation or company the subject of subsection 415D(1), 434J(1), 451E(1) or 454N(1) of the [Corporations] Act (as applicable)
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5(4)(k) a right to enforce a possessory security interest in circumstances where paragraphs 440JA(b), (c) and (d) of the [Corporations] Act are satisfied where the reference to the company in paragraph 440JA(b) of the [Corporations] Act is taken to be a reference to the *specified person* and where specified person means the body, corporation or company the subject of subsection 415D(1), 434J(1), 451E(1) or 454N(1) of the [Corporations] Act (as applicable)

5(4)(l) a right a right to enforce a possessory security interest in circumstances where paragraphs 453X(b), (c) and (d) of the [Corporations] Act are satisfied where the reference to the company in paragraph 453X(b) of the [Corporations] Act is taken to be a reference to the *specified person* and where specified person means the body, corporation or company the subject of subsection 415D(1), 434J(1), 451E(1) or 454N(1) of the [Corporations] Act (as applicable)

where specified person means the body, corporation or company the subject of subsection 415D(1), 434J(1), 451E(1) or 454N(1) of the [Corporations] Act (as applicable)

6(5)[*Applicable in relation to creditors' schemes of arrangement only*]

A right to appoint a controller of property of the specified person in the following circumstances:²¹

- (a) the whole, or substantially the whole, of the property of the specified person is subject to a security interest; and
- (b) the right is to be enforced by the person who has the security interest referred to in paragraph (a)

where specified person means the body, corporation or company the subject of subsection 415D(1), 434J(1), 451E(1) or 454N(1) of the [Corporations] Act (as applicable)

The kinds of rights which are excluded in specified circumstances - a right to appoint a controller¹⁹

6(4)A right to appoint a controller of property of the specified person in the following circumstances:²⁰

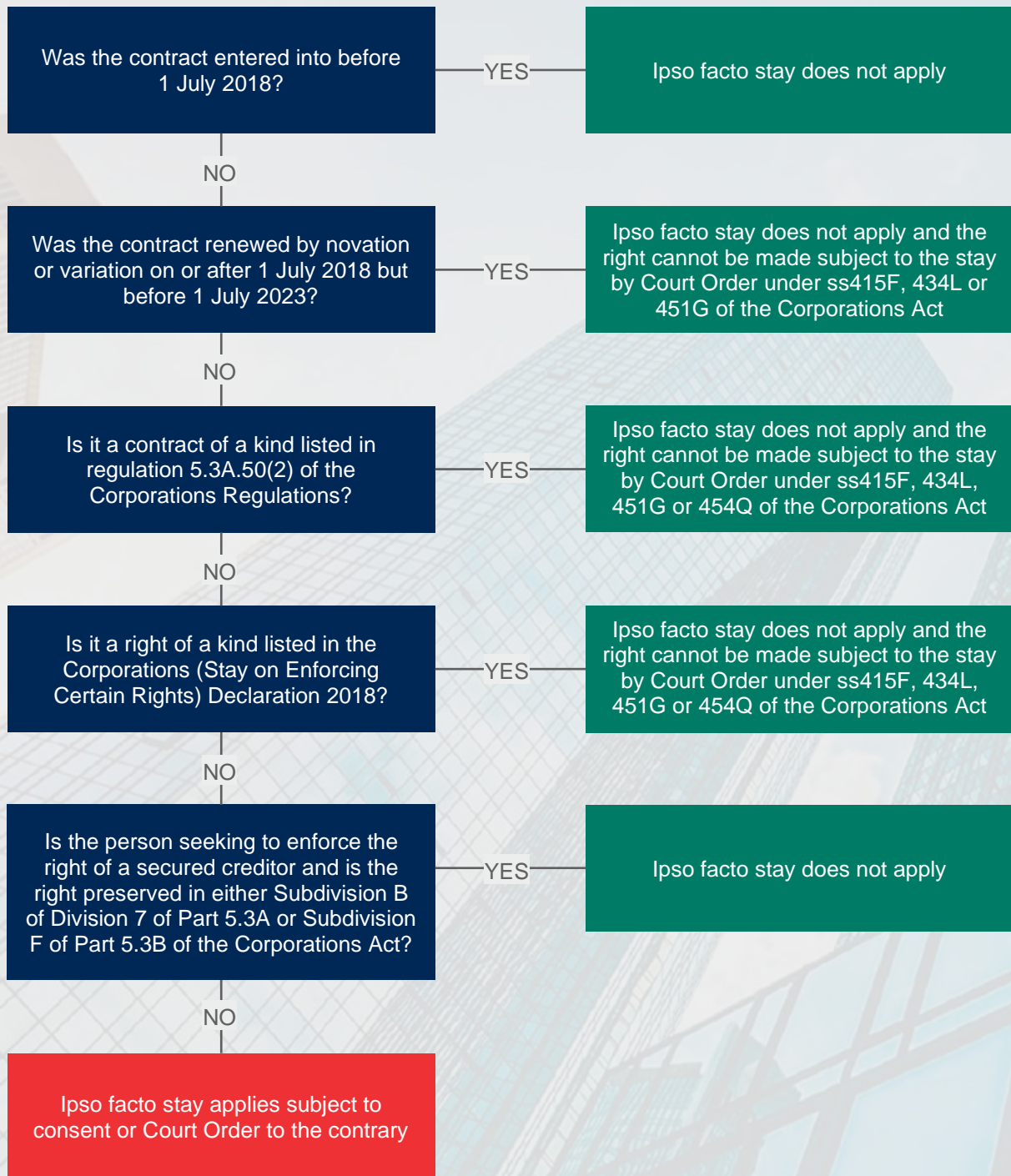
- (a) the right is to be enforced by a person who has a security interest in, or over, property of the specified person; and
 - (b) in relation to property of the specified person:
 - (i) a controller has been appointed; or
 - (ii) a right to appoint a controller has been enforced
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¹⁹ Contained in subsections 6(4) and (5) of the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* as amended

²⁰ See subsections 6(1), (2), (3) and (3A) of the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* as amended.

²¹ See subsection 6(1) of the *Corporations (Stay on Enforcement of Certain Rights) Declaration 2018* as amended.

IpsO facto stay decision tree*



*Assumes an ipso facto contractual right exists and the counterparty has entered a specified insolvency procedure

Initial judicial consideration of the stay: *Rathner*

In February 2023, the Federal Court of Australia handed down the first reported decision considering the stay provisions as applicable to a voluntary administration, *Rathner, In the Matter of Citius Property Pty Ltd (Administrator Appointed) (Rathner)*.²²

In *Rathner*, O'Bryan J was concerned with an application by the administrator of Citius Property Pty Ltd for a significant extension of the convening period, which extension would also significantly extend the period for which the ipso facto stay arising under section 451E operated.

His Honour declined to make orders sought by the administrator in relation to the operation of the stay in the event the company proceeded to liquidation following the administration, on the basis that such orders were unnecessary given that the stay on the enforcement of a right triggered by the entry into administration continues until the completion of an immediately subsequent liquidation.²³

However, the Court went on to clarify that where a counterparty's right is enlivened upon the company's subsequent entry into liquidation, section 451E does not operate to stay that right.²⁴

²² *Rathner, in the matter of Citius Property Pty Ltd (Administrator Appointed)* [2023] FCA 26.

²³ *Ibid* [59].

²⁴ *Ibid* [60].

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