

# Pooling

## Part 1

### FEATURE ARTICLE

MICHAEL HUGHES, PARTNER, MINTER ELLISON



How the proposed amendments are intended to operate

### Introduction

Readers will be well aware of the costs and complexities of conducting a voluntary administration or liquidation of a corporate group. Even where management information systems are good enough for accounts, analysis and reports to be conducted and prepared on a company-by-company basis, this may not be needed to enable stakeholders to make their decisions.

The recently announced law reform package includes measures which should prove helpful to reduce complexity and cost. The purpose of this article is to explain how the proposed changes will operate, and raise matters for practitioners to consider.

The lesson? Practitioners should understand that this is a technical issue, and not assume that the amendments have some wider effect that might be first assumed.

### How the proposals will work

#### *What is pooling?*

While the word “pooling” is not defined, its intended consequences are that each company in the group will be taken to be jointly and severally liable for the debts of every other company in the group, and all inter company debts between those companies will be extinguished.

The amendments are not intended to affect or destroy the separate legal personality of each company in a corporate group, so the group becomes a “single economic entity”. This means that practitioners need to understand how and when the changes will operate, and not simply assume that they will allow them to ignore the separate interests of each of the companies in a corporate group to which they are appointed.

#### *When is pooling available?*

Pooling will be available in voluntary administration, under a deed of company arrangement (*DOCA*) and liquidation.

Pooling is only available in voluntary administration or under a DOCA when all the companies are in voluntary administration subject to a DOCA. Pooling in liquidation is only available when all the companies are in liquidation.

There is no need for the same practitioner(s) to be appointed to all of the companies, but there would seem to be no obvious way in which (say) a company in liquidation can be pooled with a company in administration. There certainly appears to be no basis to pool a company into a group, when no appointment has been made to that company. This strengthens the case for considering the issue and seeking appointments to all group companies if the opportunity arises.

#### *What companies can be pooled?*

Besides being in voluntary administration, under a DOCA or in liquidation, the criteria for pooling appears to be the same.

The companies must be linked in one or more of the following ways:

- Related body corporate.
- Jointly liable for one or more debts or claims.
- They jointly own or one of them owns or operates property that is or was used in connection with a business, a scheme, or an undertaking carried on by them jointly. In the *Corporations Act 2001* (Cth) property is defined broadly. It is not limited to real estate.

### *How does the process start?*

If the companies are connected in this way, the practitioner gives notice of a proposed pooling determination.

Notice is to be given to creditors in the group.

There must also be a statement explaining the creditors' rights to object the procedure for doing so, as well as the form they will need to send back.

The notice must also contain a statement of the practitioner's reasons for them forming opinions about:

- Whether it will be in creditors' interests for the determination to be made.
- The extent to which particular creditors and creditors are likely to be disadvantaged.
- The likely return to creditors with pooling.
- The likely return to creditors without pooling.

The analysis needed to express reasons for opinions about these matters suggests that the proposed determination must not be issued lightly. That care must be taken when making decisions about these matters, is supported by express provisions that if the practitioner acts with due care, in good faith and for the benefit of creditors of the group considered as a whole, then he or she will not be taken to have breached any of their duties as an officer of the company, in making the declaration. However, this is not to say that the declaration may not be subject to criticism, for example in the context of an application to set aside a DOCA.

### *Can creditors object and what happens then?*

Yes. In voluntary administration creditors have ten business days to object. In a DOCA they have 15 days and in liquidation 21 days.

If any one creditor objects within this period giving a notice in the prescribed forms, the determination must not be made, and pooling can only proceed by Court order. This suggests that practitioners should make an assessment of the likelihood of objection and the cost, benefits and prospects of a Court application, if it is thought that some creditors will hold out.

### *When does pooling come into effect?*

In voluntary administration, the draft legislation says that the determination will come into force when the companies execute a DOCA.

Under a DOCA and in liquidation, it would appear to have immediate effect, or effect from any date which be nominated in the determination.

### *What if the companies do not execute a DOCA, and are liquidated?*

In this scenario, the determination made in voluntary administration appears intended to apply in liquidation, with provision being made for a deemed determination to have been made in the context of the creditors voluntary winding up that follows from a rejected or failed DOCA.

Again, further work may be needed here, as the section requires the determination to be "in force" when the creditors resolve to wind up the company. There should be no issue that the pooling determination will be "in force" if creditors vote to terminate a DOCA, and liquidate a company, but the provision appears also intended to apply to a vote at the second creditors meeting when creditors may vote down a DOCA proposal, and resolve to wind up the companies. In the normal course, the determination will not be "in force" at that point because the DOCA has not been executed.

Particular care should be taken here, because while it may make sense for a DOCA proposal to be pursued and if implemented on a pooled basis, it may not be in creditors' interests for any liquidation to be conducted in the same way if it does not proceed or fails.

### *When does Court ordered pooling take place?*

Pooling by Court happens in one of two ways. First, if a creditor objects to a pooling determination, the Court may make an order approving the determination. That application would be made by the voluntary administrator or the deed administrator. Secondly a liquidator can apply to the Court for a pooling order.

### *What criteria will the Court apply?*

If there is an objection to a pooling determination, the Court will make an order approving the determination if it is "just and equitable". In that context the Court must have regard to:

- The extent to which a company in the group, or its officers or employees were involved in the management or operations of other group companies.
- The conduct of a company or its officers or employees towards the creditors of other group companies.
- The extent to which the voluntary administration arose because of the acts or omissions of other group companies or their officers or employees.
- The extent to which activities and businesses of group companies were intermingled.
- The extent to which creditors of any group companies may be advantaged or disadvantaged.
- Any other relevant matters.

When the application is made by the liquidator, the Court must first be satisfied that the companies to which the order is to apply are appropriately connected in the way discussed earlier, after which the order will be made if it is satisfied that it is *“just and equitable”* to do so, in which regard the same criteria apply.

### *What additional orders can be made?*

In each case the Court can make a wide range of ancillary orders, including exempting specific debts or claims from the order, and that debts or assets be transferred from one company to another.

### *Can pooling be revoked or amended?*

Not without the leave of the Court. When the pooling is Court ordered, the Court may vary its order only when it is *“just and equitable”*. All this means that practitioners should take great care in resolving whether to proceed.

### *Which creditors are affected by pooling?*

The amendment appears intended to apply only to what will be provable debts under a DOCA or in liquidation.

In voluntary administration, it is expressed to apply to those debts that will be admissible to proof under a DOCA, which would not include liabilities incurred by the voluntary administrator after his or her appointment. Again this highlights the relatively limited impact of the amendment; the voluntary administrator’s liabilities still have to be incurred within and sheeted home to one or more group companies. However and again further work may be required, as this is one of the provisions that may be modified in the determination.

### *What about secured creditors?*

The pooling is expressed not to apply to secured creditors who are external to the group, other than in respect of any shortfall they suffer after realising their security. In that event the pooling will enable the secured creditor to recover their shortfall from any company to which the pooling applies. The entire debt can be recovered in this way, if the security is surrendered. However inter company debts are extinguished so any security granted within the group will be discharged as well.

While this seems logical, it is clear that the pooling order can have an economic impact on a secured creditor that does not have security from every company to which the pooling order applies. Creditors – including priority creditors – will be able to look to a company over which they may have a *“stand alone”* security, even though that company may have no other external debt.

### *What about shareholders?*

Leaving aside potential claims as creditors, in which regard the same considerations will apply, a pooling order may have a significant impact on a shareholders’ equity, where (for example) albeit related companies with different ownership are pooled. It would appear that practitioners have no obligation to notify them, and they have no rights of objection per se, although the Court would have a residual jurisdiction, for example in voluntary administration where it is alleged that the voluntary administrator is managing the company’s affairs in a way that is prejudicial to shareholders (s 447E(2)(b)).

### *Can meetings be conducted on a pooled basis?*

Yes.

This is also the case in voluntary administration even though the resolution is not yet in force, meetings can be convened and resolutions passed on a group or consolidated basis.

### *What other effects does the pooling determination have?*

While significant the effect of the determination should not be overstated. They do not have any impact at all on a practitioner’s existing obligations to act and consider the interests of each company to which they have been appointed, albeit that they may exist and operate solely in the context of a broader corporate group. The amendments have no impact on compliance requirements, such as advertising, ASIC notifications, RATAs and the like.

## Conclusion

Practitioners will no doubt welcome these amendments as providing useful solutions to commonly encountered problems. Care will need to be taken with their implementation, and their impact should not be assumed to be greater than they are. ■ ■ ■