

EXPOSURE DRAFT



Corporations (Stay on Enforcing Certain Rights) Declaration 2018

I, Kelly O'Dwyer, Minister for Revenue and Financial Services, make the following declaration.

Dated 2018

Kelly O'Dwyer [DRAFT ONLY—NOT FOR SIGNATURE]
Minister for Revenue and Financial Services

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1 Name

This instrument is the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The later of: (a) 1 July 2018; and (b) the day after this instrument is registered.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under subsections 415D(7), 434J(6) and 451E(6) of the *Corporations Act 2001*.

4 Interpretation

In this instrument:

Act means the *Corporations Act 2001*.

financing arrangement means:

- (a) any form of financial accommodation; or
(b) a contract, agreement or arrangement of a kind known as a finance lease, a bill facility, a performance bond, a guarantee, a bank guarantee, a letter of credit or a hire purchase agreement.

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

- (a) for one or more reasons; and

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(b) without any party to the contract, agreement or arrangement making a decision that the provision should apply.

specified person means the body, corporation or company the subject of subsection 415D(1), 434J(1) or 451E(1) (as applicable).

standstill or forbearance arrangement means a contract, agreement or arrangement which suspends or restricts the enforcement of rights under another contract, agreement or arrangement.

5 Declaration of kinds of rights

- (1) For the purposes of paragraph 415D(7)(b) of the Act, the kinds of rights referred to in subsection (4) are declared to be kinds of rights to which subsection 415D(1) of the Act does not apply.
- (2) For the purposes of paragraph 434J(6)(b) of the Act, the kinds of rights referred to in subsection (4) are declared to be kinds of rights to which subsection 434J(1) of the Act does not apply.
- (3) For the purposes of paragraph 451E(6)(b) of the Act, the kinds of rights referred to in subsection (4) are declared to be kinds of rights to which subsection 451E(1) of the Act does not apply.
- (4) The kinds of rights are as follows:
 - (a) a right to change the basis on which an amount in respect of or under any of the following is calculated, including due to a different rate applying:
 - (i) a financing arrangement;
 - (ii) a guarantee, an indemnity or security related to a financing arrangement (whether or not the guarantee, indemnity or security is limited in any way);
 - (b) a right to payment as indemnity for any liability or loss arising from, and any charges and expenses incurred by another person in, preserving or enforcing its rights (whether or not the indemnity is limited in any way);
 - (c) a termination right under a standstill or forbearance arrangement;

Note: This paragraph applies 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.
 - (d) a right to change the priority in which amounts are to be paid under a contract, agreement or arrangement;
 - (e) a right of set-off or a right of combination of accounts;
 - (f) a right to net balances or other amounts;
 - (g) a right to take an action to enforce a right referred to in paragraph (e) or (f), including:
 - (i) a right to accelerate or otherwise vary a date for payment of an amount; and
 - (ii) a right to convert or exchange amounts denominated in different currencies,for the purposes of enforcing a right referred to in paragraph (e) or (f);

Note: This paragraph applies whether or not an amount is due for payment, will or may become due for payment or is unpaid.

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- (h) a right to:
 - (i) assign or otherwise transfer rights or obligations; or
 - (ii) novate rights or obligations,(whether or not the right, or its enforcement, requires a person's consent (however expressed) and including where any of the rights referred to in subparagraph (i) or (ii), or the enforcement of them, does not require any consent (however expressed));
- (i) a self-executing provision to the extent that it provides that:
 - (i) property that was subject to a circulating security interest automatically becomes subject to a non-circulating security interest; or
 - (ii) a floating charge over property automatically operates as a fixed charge; or
 - (iii) in the case of property that is accounts or chattel paper, the property is automatically transferred to a secured party by way of security; or
 - (iv) the grantor of a security interest in property may no longer deal with the property;
- (j) a right to perform obligations of the specified person under the contract, agreement or arrangement or a right to enforce a right under the contract, agreement or arrangement that would be enforceable by the specified person.

Note: A right referred to in this subsection extends to a self-executing provision that corresponds to the right.

- (5) In paragraph (4)(i), words and expressions that are defined for the purposes of the *Personal Property Securities Act 2009* have the same meanings.

6 Declaration of kinds of rights in specified circumstances

- (1) For the purposes of paragraph 415D(7)(c) of the Act, a right to appoint a controller is declared to be a kind of right to which subsection 415D(1) of the Act does not apply in the circumstances specified in subsection (4).
- (2) For the purposes of paragraph 434J(6)(c) of the Act, a right to appoint a controller is declared to be a kind of right to which subsection 434J(1) of the Act does not apply in the circumstances specified in subsection (4).
- (3) For the purposes of paragraph 451E(6)(c) of the Act, a right to appoint a controller is declared to be a kind of right to which subsection 451E(1) of the Act does not apply in the circumstances specified in subsection (4).
- (4) The circumstances are as follows:
 - (a) the right is to be enforced by a person who has a security interest in 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.